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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 174

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MINNESOTA TEA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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vs.

MINNESOTA TEA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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A [Caption omitted.]

1 Before United States Board of Tax Appeals

Docket No. 54227

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order extending time to file record to May 15, 1934

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to May 15, 1934.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C., April 5, 1934.

Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed:) Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

Order extending time to file record to July 2, 1934

For cause appearing of record, it is

Ordered that the time for transmiss[illegible]nd delivery of the record sur petition for review of the above[illegible]itled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to July 2, 1934.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C., May 15, 1934.

2 Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed:) Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

Docket No. 54227

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For taxpayer, J. M. Haynes (withdrawn), C. J. McGuire (withdrawn), Oscar Mitchell, Esq.; for comm'r., G. D. Brabson, Esq., Prew Savoy, Esq.

1931
Mar. 20—Petition received and filed. Taxpayer notified. (Fee paid.)
" 21—Copy of petition served on General Counsel.
Apr. 25—Answer filed by General Counsel.
May 2—Copy served on taxpayer, assigned to General Calendar.
1932
Sept. 21—Hearing set Oct. 12, 1932.
Oct. 12—Hearing had before J. M. Sternhagen, Div. 10. Submitted on merits. Stipulation of facts and exhibits filed. Briefs due Nov. 22, 1932. Dec. 1, 1932 for replies. Exchange by counsel.
" 19—Transcript of hearing of 10/12/32 filed.
Nov. 22—Brief filed by taxpayer. Copy served 11/23/32.
" 22—Brief filed by General Counsel.
" 30—Motion for extension for 10 days to file reply brief filed by taxpayer. Granted.
Dec. 12—Reply brief filed by taxpayer.
1933
June 30—Opinion rendered J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.
3 July 29—Motion for rehearing filed by General Counsel. 8/1/33 granted.
Sep. 1—Motion to set aside order granting respondent's motion for rehearing filed by taxpayer. 9/29/33 denied.
" 29—Memorandum to accompany denial of motion of petitioner (filed Sept. 1, 1933) filed.
Oct. 17—Rehearing set Nov. 8, 1933.
" 25—Motion for leave to amend answer, amendment tendered, filed by General Counsel. 10/27/33 granted.
" 26—Motion to refer to full Board Judge Sternhagen's decision on petitioner's motion filed by taxpayer.
Nov. 7—Order denying taxpayer's motion of 10/26/33 entered.
" 8—Hearing had before Mr. Sternhagen on motion for rehearing—respondent closes on rehearing. Petitioner moves for judgment as per deficiency notice. Denied. Statement of recomputation—(petitioner has been served by respondent—no contest). Judgment will be entered.
" 13—Judgment entered, J. M. Sternhagen, Div. 10.
" 14—Transcript of hearing of Nov. 8, 1933, filed.

1934
Feb. 5—Notice of withdrawal of J. Marvin Haynes and C. J. McGuire and appearance of Oscar Mitchell as counsel for taxpayer filed.
" 5—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.
" 5—Proof of service filed by taxpayer.
Mar. 10—Praecipe with proof of service thereon filed.
" 20—Copy of order from 8th Circuit directing transcript of proceedings to be incorporated into transcript filed.
Apr. 5—Order enlarging time to May 15, 1934, for transmission and delivery of record sur petition for review entered.
4 May 15—Order enlarging time to July 2, 1934, for transmission and delivery of record sur petition for review entered.

Before United States Board of Tax Appeals

[Title omitted.]

Petition of Minnesota Tea Company

Filed March 20, 1931

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-3:SON-60D) dated January 26, 1931, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with principal office at 2023 West Superior Street, Duluth, Minnesota.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on January 26, 1931.

3. The taxes in controversy are income taxes for the year 1928 and in the amount of $11,587.64.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The respondent has erroneously included in taxable income an amount of $106,471.73, representing an alleged profit realized from the transfer of petitioner's assets in a reorganization.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On August 23, 1928, in pursuance of a plan of reorganization, petitioner transferred all of its assets to Grand Union Company and received in exchange therefor 18,000 shares of common stock of said Grand Union Company plus $426,842.52 in cash.

(b) Petitioner in pursuance of the plan of reorganization, immediately distributed all of the cash to its stockholders.

(c) Petitioner's stockholders assumed liabilities of the corporation amounting to $106,471.73.

5 (d) Respondent has added to petitioner's taxable income an amount of $106,471.73, representing an alleged profit realized by the petitioner upon the above transfer of assets.

(e) If the amount of $106,471.73 is excluded from petitioner's taxable income, petitioner sustained a net loss for the year 1928.

6. Wherefore, the petitioner prays that this Board may hear the proceeding and—

(a) Exclude from petitioner's taxable income the amount of $106,471.73.

(b) Disallow the deficiency of $11,587.64.

(c) Afford such further relief as the nature of the case may require and to the Board may seem equitable and proper.

J. MARVIN HAYNES,
Counsel for Petitioner, 916 Investment Bldg., Washington, D. C.

Of Counsel: Lybrand, Ross Bros. & Montgomery, C. J. McGuire, W. C. Magathan.

Dated, March 18, 1931.

[*Duly sworn to by E. C. Peterson, jurat omitted in printing.*]

6 *Exhibit "A" to petition*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, January 26, 1931.

MINNESOTA TEA COMPANY,
2023 West Superior Street, Duluth, Minnesota.

Sirs: In accordance with the provisions of section 273 (a) of the Revenue Act of 1928, there has been assessed against you an income tax amounting to $11,587.64 for the taxable period January 1, 1928, to August 24, 1928, the details of which are set forth in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given to the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

Respectfully,

DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER.

Enclosures:
Statement.
Schedule.

STATEMENT

IT:AR:D-3
SON-60D

In re: Minnesota Tea Company, 2023 West Superior Street, Duluth, Minnesota.

Tax liability

Period, January 1, 1928, to August 24, 1928:	
Correct tax liability	$11,587.64
Tax previously assessed	None
Deficiency	$11,587.64

Reference is made to the report of the internal revenue agent in charge, St. Paul, Minnesota, disclosing no change in your tax liability for the period indicated.

7 You are advised that this office may not approve the recommendation of the agent in charge, of which you were advised under date of August 25, 1930, that your return for the period ended August 24, 1928, be accepted as correct.

The reasons for this action are as follows:

This office holds that a taxable profit resulted to the Minnesota Tea Company from the disposition of its assets and business on August 23, 1928, to the Grand Union Company in exchange for stock of the latter and a sum in cash, whereas the examining officer held that the transaction was a reorganization under section 112 (i) (1) (B) of the Revenue Act of 1928 and resulted in no gain or loss to the Minnesota Tea Company or the Peterson Investment Company.

The facts in the case show that prior to such disposition of its assets, the Minnesota Tea Company formed, or caused to be formed, the Peterson Investment Company, and on July 14, 1928, certain assets were transferred by your corporation to the latter corporation in exchange for the entire capital stock of the latter. The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments, and certain other assets. Immediately upon receipt of such stock by your corporation it was distributed pro rata among its stockholders.

The remaining assets in the Minnesota Tea Company were transferred to the Grand Union Company on August 23, 1928, in exchange for 18,000 shares of common stock in said Grand Union Company and a payment in cash in the amount of $426,842.52. The aforesaid 18,000 shares of common stock in the Grand Union Company constituted less than a majority of the outstanding shares of stock in said company. The following resolution was adopted at a special meeting of the stockholders of the Minnesota Tea Company held on August 22, 1928, with respect to the disposition of the aforesaid cash received by said company.

"Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to

8 hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell

any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

The facts at hand show that the Minnesota Tea Company owed debts amounting to $106,471.73 and that on August 23, 1928, it distributed the first cash received through the following journal entry:

"Dr.	Reserve for appreciation of goodwill	$256,348.90	
	Notes payable	25,000.00	
	Accounts payable	73,918.46	
	A. F. Peterson	130.58	
	L. T. Peterson	1,613.74	
	E. C. Peterson	4,779.78	
Cr.	Cash		$361,791.46

"To record distribution to stockholders in accordance with plan of reorganization adopted and ratified at meeting of the stockholders on 3 22/28 of the cash received and assumption of the liabilities by the stockholders in accordance with agreement.

"From this it will be noted that the stockholders accounts payable were paid in cash by the corporation through the above journal entry, and the balance of the liabilities were paid by the stockholders after the above distribution.

SCHEDULE 1

Net loss reported on return		($9,908.07)
Additional income:		
Profit on disposition of assets		106,471.73
Net income adjusted		96,563.66

9 Explanation of changes

For details see statement.

SCHEDULE #2

Computation of tax

Net income adjusted	$96,563.66
Tax on 12%	11,587.64
Tax previously assessed	None
Deficiency in tax	11,587.64

"There is a difference of $1,029.17 between the total liabilities above and the amount of $106,471.73 which was adjusted at the time the balance of the sale price of $426,842.52 was received."

From the foregoing it is to be assumed that the entire amount of cash received by the Minnesota Tea Company from the Grand Union Company was distributed to the stockholders in the Minnesota Tea Company, who paid the debts of said latter corporation out of the moneys received, said stockholders retaining out of said moneys the following amounts in their capacity as creditors of said corporation:

A. F. Peterson	$130.58
L. T. Peterson	1,613.74
E. C. Peterson	4,779.78

After the distribution of the cash received from the sale of its assets, the Minnesota Tea Company had nothing on its books except the stock in the Grand Union Company. The corporate structure of the Minnesota Tea Company had not changed. It is still a going concern, and its stock is held by the same persons as before the sale.

With reference to the transfer of a portion of its assets to the Peterson Investment Company, since the Minnesota Tea Company or its stockholders or both were in complete control of the transferee immediately after the transfer, said transaction clearly constituted a reorganization under section 112 (i) (1) (B) of the Revenue Act of 1928, to which both of said corporations were parties. No taxable gain resulted to the Minnesota Tea Company from this transaction under section 112 (b) (4) of the Revenue Act of 1928. No gain was recognized to the stockholders in the Minnesota Tea Company under section 112 (g) of the aforesaid act. No gain was recognized to the Peterson Investment Company, said transaction being regarded as a purchase from the standpoint of said company. The cost or other basis of the stock in the Minnesota Tea Company to the stockholders therein should be allocated or apportioned between that stock and the stock in the Peterson Investment Company, in the ratio or proportion of the respective values thereof as of the effective date of the distribution to the stockholders of the stock in the latter, as provided in article 600 of Regulations 74, as amended by Treasury Decision 4274, Cumulative Bulletin VIII–2, page 240. Under section 112 (a) (7) of the 1928 Act the basis of the assets transferred by the Minnesota Company to the Peterson Investment Company is the same as said assets had in the hands of the Minnesota Tea Company.

With reference to the transfer of the remaining assets to the Grand Union Company on August 23, 1928, it is to be noted that said assets constituted all the properties then owned by the Minnesota Tea Company. Said transfer, therefore, falls within the definition of a reorganization as set out in section 112 (i) (1) (A) of the 1928 Act in that it was the acquisition by one corporation of all the properties of another corporation. Both the Minnesota Tea Company and the Grand Union Company were parties to said reorganization. General Counsel's Memorandum 3827, Cumulative Bulletin, VII–2, page 114.

The Minnesota Tea Company, having distributed the entire $426,842.52 cash received by it to its stockholders in the manner herein-

above related, the question is presented, whether such distribution, to the extent that said money was used to pay the corporate debts in the amount of $106,471.73, including the debts of said corporation to its stockholders, fall within the meaning of the word "distribute" as it is used in section 112 (d) (2) of the 1928 Revenue Act. To the extent that the stockholders were required to pay the corporate debts out of such money, they clearly could not be taxed on such income, nor would the basis of their stock be affected. Such distribution redounded to the benefit of the corporation as much as if the corporation itself had paid its corporate debts out of said cash received, and distributed the balance to its stockholders as ordinary or liquidating dividends.

The effect of using the money to pay the corporate debts, whether paid directly by the corporation to the creditors, or by the corporation to its stockholders who in turn paid the creditors, would be to increase the value of the corporate property to the extent
11 of the debts paid. In other words, the corporation, from an economic standpoint, would retain the benefit of the cash received just as if it had kept said cash and left its debts outstanding. The Bureau has, heretofore, taken the position that the word "distribute" does not include a distribution to creditors. This being true, it seems to logically follow that a distribution to stockholders for the benefit of creditors falls within the same category.

In the light of the foregoing it is the opinion of this office that the word "distribute" as used in section 112 (d) (2) of the 1928 Act can reasonably and should be interpreted to mean a distribution to stockholders to be used for their own benefit, and not a distribution to or for the benefit of creditors, and that the Minnesota Tea Company did not distribute the cash received by it to the extent of the amount of its debts, namely, $106,471.73, within the meaning of section 112 (d) (2) of the 1928 Act.

The basis of the assets transferred by the Minnesota Tea Company to the Grand Union Company was $199,016.09, taxable gain in the amount of $106,471.73 was realized by the Minnesota Tea Company as a result of the transaction between it and the Grand Union Company, under the provisions of section 112 (d) (2) of the 1928 Revenue Act. The basis of the stock in the Grand Union Company in the hands of the Minnesota Tea Company must be determined under section 113 (a) (6) of the Revenue Act of 1928. No gain or loss was recognized to the Grand Union Company, the transaction being regarded as a purchase from the standpoint of said company.

In view of the fact that there has been a transfer of your assets, the Bureau will be unable to afford you an opportunity under the provisions of article 1211 of Regulations 69 and/or article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided in sections 274 and 279 of the Revenue Act of 1926 and/or sections 273 and 274 of the Revenue Act of 1928 and it is, therefore, necessary at this time in order that the interests of the Government may be protected to issue this formal notice of deficiency.

Before United States Board of Tax Appeals

[Title omitted.]

Answer of Commissioner of Internal Revenue

Filed April 25, 1931

12 The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits, alleges, and denies as follows:

1 and 2. Admits the allegations of paragraphs 1 and 2 of the petition.

3. Alleges that the notice of deficiency dated January 26, 1931, sets forth a deficiency in income tax amounting to $11,587.64 for the period January 1, 1928, to August 24, 1928.

4. Denies the allegations of paragraph 4 of the petition, and further denies that the respondent erroneously determined the tax liability of the petitioner for the said period.

5 (a) to (e), inclusive. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 5 (a) to (e), inclusive, of the petition, and therefore denies the same.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
HARTFORD ALLEN,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Amendment to answer of Commissioner of Internal Revenue

Filed October 27, 1933

Now comes the Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and for amendment to his answer heretofore filed herein on April 25, 1931, alleges:

(1) That in the notice of deficiency for the taxable period in question mailed to petitioner under date of January 26, 1931, the Commissioner assumed that the acquisition by the Grand Union Company of substantially all of the assets of the Minnesota Tea

Company constituted a reorganization such as is contemplated by Section 112, Revenue Act of 1928, such reorganization having
13 been claimed by the petitioner in its income-tax return for said period; and respondent therefore treated the gain realized by petitioner from said transaction as nontaxable except as to the amount of the cash received by the stockholders of petitioner which was used by them to pay the outstanding debts of petitioner in the sum of $106,471.73.

(2) Respondent now alleges that his action in so doing was erroneous; that said transaction was not in fact a reorganization as contemplated by the statute and that petitioner was taxable upon the entire amount of gain realized by the petitioner from said transaction in the amount of $712,195.90, which sum represents the difference between the cost of petitioner's properties sold, to-wit, $254,646.62 and the sum total of the cash and the value of the stock received by petitioner, to-wit, $426,842.52 cash and $540,000.00, the value of the 18,000 shares of Grand Union Company.

Wherefore, respondent prays that the contentions of petitioner be denied and that a deficiency in tax be redetermined against the taxpayer for the period January 1 to August 24, 1928, in accordance with the attached recomputation.

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
GEORGE D. BRABSON,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

[Title omitted.]

Agreed statement of facts

Filed October 12, 1932

It is hereby stipulated and agreed by and between Minnesota Tea Company, petitioner, and the Commissioner of Internal Revenue, respondent, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not at variance with the facts herein stipulated.

14 1. The petitioner is a Minnesota corporation with principal office at 2023 West Superior Street, Duluth, Minnesota, engaged in the business of selling teas, coffees, and groceries at retail.

2. On July 14, 1928, the petitioner formed, or caused to be formed, the Peterson Investment Company, a corporation, and transferred thereto certain of its assets in exchange for the entire capital stock of Peterson Investment Company. The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments, and other miscellaneous assets. Immediately upon receipt of the stock of Peterson Investment Company it was distributed by petitioner pro rata among its stockholders.

3. The organization of Peterson Investment Company, and the subsequent action described in paragraph 2 immediately preceding, was accomplished in accordance with a resolution of the stockholders of Minnesota Tea Company, adopted on June 18, 1928, a copy of which is attached hereto, made a part hereof, and marked "Exhibit F."

4. On August 23, 1928, petitioner transferred all of its assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of common stock of said Grand Union Company, plus $426,842.52 in cash.

5. The transfer effected as described in paragraph 4, immediately preceding, was accomplished in accordance with the following plan:

(a) On August 22, 1928, the stockholders of Minnesota Tea Company adopted a resolution, a copy of which it attached hereto, made a part hereof, and marked "Exhibit A."

(b) A copy of the option dated July 2, 1928, referred to in the aforedescribed resolution is attached hereto, made a part hereof, and marked "Exhibit B."

(c) On August 22, 1928, the Directors of Minnesota Tea Company adopted a resolution, a copy of which is attached hereto, made a part hereof, and marked "Exhibit C."

(d) On July 6, 1928, the option of July 2, 1928, was accepted by O. B. Westphal, Esq., who in all of the transactions with Minnesota Tea Company was acting as agent for Grand Union Company.

(e) On July 24, 1928, an agreement supplemental to the option of July 2, 1928, was accomplished, a copy of which is attached hereto, made a part hereof, and marked "Exhibit D."

(f) Also attached hereto and made a part hereof is a copy of the minutes of a stockholders meeting held on August 23, 1928, marked "Exhibit E."

6. Upon receipt of such consideration, the petitioner immediately paid the entire sum of $426,842.52 so received to its stockholders in proportion to their stockholdings.

7. Said payment was made pursuant to the following resolution adopted at a special meeting of the stockholders of petitioner held on August 22, 1928, at which the aforesaid reorganization was approved by the stockholders:

"Resolved further that all moneys received by Minnesota Tea Company on such sales of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion

of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

8. The amount of the liabilities of the petitioner at August 23, 1928, which were assumed and discharged by the stockholders of petitioner, pursuant to the foregoing quoted resolution, was $106,471.73.

9. Respondent in determining the proposed deficiency herein added to petitioner's taxable income an amount of $106,471.73, representing an alleged profit realized upon the above transfer of assets to Grand Union Company.

16 10. If the said amount of $106,471.73 so added by the Commissioner to petitioner's taxable income be excluded therefrom, petitioner sustained a net loss for the year 1928.

C. J. McGUIRE,
Attorney for Petitioner.
C. M. CHAREST,
General Counsel,
Attorney for Respondent.

Exhibit "A"

Minutes of the special meeting of the stockholders of Minnesota Tea Company, held at its office in the City of Duluth, Minnesota, on the 22nd day of August 1928 at ten o'clock in the forenoon.

Pursuant to the call of the president a special meeting of the stockholders of the company was held at its offices, in the City of Duluth, Minn., on August 22nd, 1928, at ten o'clock in the forenoon, after all the stockholders in writing had mutually agreed and consented to the holding of such meeting and waived notice of the time and place and the purposes of such meeting required by the bylaws of the company and the statutes of the state.

All the stockholders were present during the meeting and participated therein and in the proceedings.

E. C. Peterson presided and A. F. Peterson acted as the secretary thereof.

The president reported to the meeting that it was advisable that all the assets of the company should be sold under the option dated July 2, 1928, given by the president and secretary to O. B. Westphal as modified by an agreement dated July 24th, 1928, upon the terms therein set out, except that, as the company has conveyed all its real estate, the lease specified in such option shall be made by Peterson Investment Company, the owner of the property, and further that it was advisable to distribute to the company's stockholders all the moneys received on such sale, whenever received by the company, ratably according to their stockholdings, and that the stockholders should assume the corporate debts to enable it to hold all the corporate stock or securities received.

After a full discussion and consideration of the matters re-
17 lating to such reorganization and in order to effect such reorganization by the sale of the company's assets for corporate securities or stock and moneys and the distribution of the moneys to the stockholders and the retention by the company of all the said stock and securities, a written resolution was read and its adoption moved, seconded, and carried by the unanimous vote of all the stockholders. Such resolution was of words and tenor as follows:

"Resolved that the written option, dated July 2nd, 1928, and made by the President and Secretary of the company, in behalf of Minnesota Tea Company, to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying the said option, be and hereby are ratified, confirmed, and approved, and that the actions of the President and Secretary in giving and executing such option and in signing and executing such agreement modifying said option be and are hereby in all things ratified, confirmed, and approved.

Resolved further that the assets of Minnesota Tea Company described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee, in pursuance of and under such option and agreement modifying the same and on the terms therein stipulated and thereby agreed and for the consideration therein and thereby stipulated, or upon such other terms as may be deemed advisable by the board of directors, and that any other assets, if any there be, owned by, or in the disposition of, Minnesota Tea Company be sold or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

Resolved further that the Board of Directors be and hereby are authorized and directed to effect and make such sale and transfer of all the assets of Minesota Tea Company upon the terms and for the considerations stipulated in said option and agreement modifying the same, or upon such other terms as the Board of Directors, or the president, by the board thereto authorized, may deem advisable.

Resolved further that the Board of Directors, in order to effect such sale of said assets of this company, and to carry out the
18 terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and are hereby authorized and directed to cause to be executed and delivered to the purchaser of said assets, in behalf of and by Minnesota Tea Company, any bill of sale, assignments, agreements or other instruments by the President and the Secretary and to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of Minesota Tea Company whether due and payable or not and whether certain or contingent.

Resolved further that Minnesota Tea Company shall continue to own and hold the said corporate stock and securities without the sale or distribution thereof."

It was then moved, seconded, and carried by the vote of the stockholders that the written consent to the holding of the special meeting and the waiver of notice of the holding thereof and the written resolution adopted at the meeting be copied into the minutes of the meeting and that said written consent and waiver and said written resolution adopted be filed with the files and records of the company.

The said written consent and waiver were of the following words and tenor:

We, the undersigned, being all the stockholders of Minnesota
19 Tea Company, do hereby mutually consent to the holding of a special meeting of the stockholders of Minnesota Tea Company and its stockholders at the office of the corporation in the City of Duluth, Minnesota, for any purpose, or purposes, that may affect the corporation and its business, as call by the President, and we

waive any and every notice, or notices, of such meeting and of the purpose thereof required by the statutes of Minnesota or the By-Laws of the corporation.

Dated August 22, 1928.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

The meeting of the stockholders adjourned on motion made and carried.

(Signed) A. F. PETERSON,
Secretary.

Attest:

(Signed) E. C. PETERSON,
President.

The undersigned, being all the stockholders of Minnesota Tea Company, do hereby certify that the foregoing minutes are true and correct.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

Exhibit "B"

DULUTH, MINN.,
July 2, 1928.

O. B. WESTPHAL, ESQ.,
Chicago, Ill.

DEAR SIR:

In consideration of $100, the receipt of which is hereby acknowledged, the undersigned corporation, organized and existing under the laws of the State of Minnesota, having its principal office at No. 2023 West Superior Street, Duluth, Minnesota, grants to you an irrevocable option as follows:

First: This option shall extend for thirty days from date.

Second: The option may be exercised by notice in writing mailed or delivered to the undersigned by you within the period of the option.

Third: If the option is exercised within the time and in the manner hereinbefore provided, the undersigned shall thereupon be obligated to sell, and you shall be obligated to purchase or cause to be purchased, subject to all of the conditions herein contained, the assets of the undersigned hereinafter described for the consideration hereinafter set forth.

Fourth: The assets referred to in Paragraph Third hereof shall consist of all of the assets owned by the undersigned upon the de-

livery date, of every kind and description other than real estate, buildings, fixtures, cash, the interest of the undersigned in any insurance policies upon the lives of any and all of its officers, and any bills, notes, accounts receivable which you and the undersigned shall consider doubtful and also other than insurance on buildings and fixtures, and including the goodwill and the right to use the name of the undersigned and including all trade marks and trade names.

Fifth: The consideration provided for in Paragraph Third hereof shall consist of the following:

(a) An amount in cash equal to the total value of the following:

(1) Inventories of merchandise and supplies at cost in place of the undersigned, or wholesale market value, whichever shall be lower;

(2) Bills, notes, and accounts receivable at face value, except that with respect to balance of premium accounts, 60% of the face value shall be taken;

(3) Furnishings and equipment at depreciated book value or at reproduction cost less depreciation, whichever shall be lower;

(4) And, such an additional amount in cash for goodwill as, when added to the values of the property described in paragraphs (1), (2), and (3) above, shall make the total consideration provided for in this subdivision (a), the sum of $400,000.

(b) Voting Trust Certificates for Eighteen Thousand (18,000) shares of fully paid and nonassessable Common Stock without par value of The Grand Union Company, a Delaware corporation.

In the event that Lybrand, Ross Brothers & Montgomery and the auditors of the undersigned shall be unable to agree upon the
21 values of the property described in subdivisions (1), (2), and (3) of paragraph Fifth herein, it is agreed between us that the determination of the value of said several items in subdivisions (1), (2), and (3) aforesaid, as made by said Lybrand, Ross Brothers & Montgomery shall be final and binding upon us hereunder.

Sixth: It shall be a condition of the conveyance of the assets of the undersigned as hereinbefore provided, that The Grand Union Company or one of its subsidiaries shall assume all contracts of the undersigned existing at the date hereof, and disclosed in writing to you before the date hereof, together with all contracts entered into by the undersigned between the date hereof and the date of delivery in the ordinary and usual conduct of the business for the purpose of merchandise for a period of not over ninety days and together with all other contracts entered into by the undersigned with your approval between the date hereof and the delivery date. Further, the undersigned agrees not to enter into any contracts for chattels, machinery or equipment during the period of this option without your consent in writing.

It shall be a further condition to the conveyance of the assets of the undersigned as hereinbefore provided that the total value of the assets conveyed of the kind described in subdivisions 1, 2, and 3 of clause (a) of Paragraph Fifth hereof (determined as in said Para-

graph Fifth provided) shall at the time of the conveyance be at least as great as the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927.

In the event the value of the total assets (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be less than the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927; the undersigned agrees to reduce the total purchase price in an amount equal to the difference between the total value of the assets on the date of delivery and the total value of the assets (determined as in said Paragraph Fifth provided) owned by the undersigned on December 31, 1927.

In the event the value of the total assets (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be greater than the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927, then you shall agree to increase the total purchase price in an amount equal to the difference between the total value of the assets (deter-
22 mined as in said paragraph Fifth provided) owned by the undersigned on December 31, 1927.

It is further agreed by the undersigned that between the date hereof and the delivery date, the undersigned will conduct its business in the normal and usual course and will not dispose of any assets or collect any accounts receivable other than in the normal conduct of the business.

Seventh: The delivery date shall be determined by you provided that such delivery date shall be not less than ten and not more that forty-five days after the date of the exercise of the option, and provided further that you shall have given the undersigned at least five days' notice in writing of the delivery date. The place of delivery shall be at such place in New York City, N. Y., as you shall designate. Delivery shall be made by instruments of conveyance in form that are, or should be, satisfactory to your counsel running to a nominee to be named by you upon payment of 90% of the cash purchase price of $400,000 payable under subdivision (a) of Paragraph Fifth hereof, and the delivery of the Voting Trust Certificates provided for in subdivision (b) of Paragraph Fifth hereof. Payment of the balance of the purchase price payable to the undersigned hereunder, or any refund of any excess payment which shall have been made, shall be made upon final determination as to any undisclosed liabilities of the undersigned not assumed by you hereunder, together with interest at the rate of 6% from the date of the delivery, such final determination to be made not later than thirty days after the delivery date. In the event that you shall be unable to make delivery of the Voting Trust Certificates provided for in subdivision (b) of Paragraph Fifth hereof because of any delay in listing the same upon the New York Stock Exchange, the time for the delivery of such Voting Trust Certificates may at your option be extended up to but not later than forty-five days after the delivery date herein-

before provided for; it being understood, however, that you will use your best efforts to make delivery of the Voting Trust Certificates at the earliest possible date.

Eighth: The undersigned further agrees to execute or to cause to be executed, as lessor, a lease for the term of five years from said delivery date, in form and with such provisions as are in common use in Minnesota, at a rental of $36,000 for said term, payable in monthly installments of $600.00 on the first day of each and every month during said term in advance, covering the following de-
23 scribed property in St. Louis County, Minnesota, to wit: The Southerly seventy (70) feet of lot numbered 332, on West First Street, Duluth Proper, Second Division, according to the recorded plat thereof in the office of the Register of Deeds for St. Louis County, Minnesota; and the two-story brick building and basement known as 2021 and 2023 West Superior Street, City of Duluth, Minnesota, except the store room, 20 x 60, known as 2021 West Superior Street; being the premises now used by the undersigned for warehouse and garage purposes; and you agree to cause such lease to be executed by The Grand Union Company or a subsidiary as lessee.

The undersigned further agrees that said lease shall contain an agreement which shall give to the lessee, or assigns, the exclusive right and option to take a lease of said premises, for the additional term of five years, beginning at the termination of the lease provided for above, on the same terms and conditions as the first lease, except as hereinafter specified, provided that notice in writing of intention to exercise the option to take such additional lease shall be served upon the undersigned, its successors or assigns, being the record owners of said real estate at said time, at least three months prior to the termination of the five-year lease first hereinabove described. In the event that the lessee shall elect to exercise the option to take said additional lease, the rental to be paid for said premises for said term shall be such sum per annum as shall equal 10% of the value of said leased premises at the beginning of said second lease term, which rental shall be payable in equal monthly installments in advance on the first day of each month during said term. In the event that the lessee and the undersigned, or our respective successors or assigns, shall be unable to agree upon the value of said leased premises at said time, then the value of said leased premises shall be determined by arbitration, by three arbitrators, one to be selected by the lessee; one to be selected by the undersigned, or assigns; and the third by the two arbitrators so chosen. If any arbitrator provided for hereunder shall not be appointed or selected within a reasonable time, then, either party or assigns, after reasonable notice to the other, may apply to any judge of the United States District Court for Minnesota for the appointment of such arbitrator or arbitrators, whose selection shall be binding upon the parties.

Ninth: The undersigned agrees simultaneously with the conveyance of assets herein provided to change its name to a name satisfactory to you and it further agrees in consideration of the
24 purchase of such assets that it will not hereafter engage in the Wagon Route tea and coffee business in any part of the United States.

Tenth: The undersigned agrees that it will not, for a period of one year from the delivery date, dispose of any of the Voting Trust Certificates to be received by it as hereinbefore provided other than to its stockholders, and it further agrees that if it disposes of any of the same to any of its stockholders, it will cause them at the time of the acquisition to enter into an agreement with The Grand Union Company agreeing that for such period they will not sell or otherwise dispose of any of the same to be acquired by them.

Eleventh: The undersigned agrees upon the delivery date to cause E. C. Peterson (hereinafter called "Employed" or included among those called "Employed"), to enter into an agreement for the employment of E. C. Peterson by The Grand Union Company or a subsidiary for the period of five years at a salary of Eleven Thousand ($11,000) Dollars per annum, payable monthly, plus 3½% of the net profits after income taxes of the branch or branches which will be under the management of the Employed E. C. Peterson, and the undersigned further agrees upon the delivery date to cause L. T. Peterson (hereinafter called the "Employed" or included among those called "Employed") to enter into a like agreement for a period of five years at a salary of Eleven Thousand ($11,000) Dollars per annum, payable monthly, plus 3½% of the net profits, after income taxes, of the branch or branches which will be under the management of the Employed L. T. Peterson, and the undersigned further agrees upon the delivery date to cause A. F. Peterson (hereinafter called the "Employed" or included among those called "Employed") to enter into a like agreement for the period of five years at a salary of Six Thousand Five Hundred ($6,500.00) Dollars per annum, payable monthly, plus 3% of the net profits, after income taxes, of the branch or branches which will be under the management of the Employed A. F. Peterson, such agreements to provide that the Employed will give all his time to the service of your Company or a subsidiary and will not for a period of one year after the termination of his, or their, as the case may be, employment, enter into any business in any part of the United States competitive with the business of The Grand Union Company or any of its subsidiaries, and such agreement or agreements to further provide that not more than 20% of the Voting Trust Certificates which shall be distributed to any one of the Employed by the undersigned shall be sold or otherwise disposed of by the Em-
25 ployed during any year after the first year of his employment.

You agree upon the delivery date to cause The Grand Union Company or a subsidiary to enter into the above described employment contracts.

Twelfth: The undersigned agrees throughout the pendency of this option, to afford to you and your representatives, access at all reasonable times to the books, records, accounts and properties of the undersigned for the purpose of enabling you to acquire any information relative thereto which you may desire.

Thirteenth: Your obligations hereunder shall be subject

(a) to your having exercised the option as hereinbefore provided, and

(b) That the undersigned shall have fully performed all the obligations and conditions hereunder to be performed by it prior to the payment thereunder, and that all requisite action shall have been taken by the undersigned for the purpose of validly conveying the assets as hereinbefore required, including compliance with any applicable Bulk Sales Laws and that the bills of sales and any other instruments or assignments tendered hereunder are sufficient to vest you or your assigns with good and marketable title to all of the assets to be conveyed, and that the lease hereinbefore provided for is valid and binding; all in such manner and form as shall be, or should be, satisfactory to your counsel; and that

(c) the undersigned shall not have suffered a loss on account of fires, flood, accident, or other calamity which in your opinion substantially affects the conduct of its business, regardless whether the amount of such loss shall have been insured.

Fourteenth: All notices under this Agreement shall be in writing and if to the undersigned, shall be sufficient in all respects if delivered in person or sent by registered mail to the undersigned at 2023 West Superior Street, Duluth, Minnesota, and if to you shall be sufficient in all respects if delivered in person or sent by registered mail to you, Evanston Hotel, Evanston, Ill.

Yours very truly,

MINNESOTA TEA COMPANY,
By E. C. PETERSON,
President.

Attest:

A. F. PETERSON, *Secretary.*

26 *Exhibit "C"*

Minutes of the meeting of the Board of Directors of Minnesota Tea Company held on August 22, 1928, at two o'clock in the afternoon, pursuant to call of the President.

All the members of the Board of Directors were present and E. C. Peterson presided at the meeting and A. F. Peterson acted as Secretary.

The following written resolution was read, its adoption moved, seconded, and carried and adopted by the unanimous vote of the Directors:

"Whereas, at a special meeting of the stockholders of Minnesota Tea Company, held at the office of the company, on August 22, 1928

at ten o'clock in the forenoon, the stockholders adopted a resolution in writing of the following words and tenor:—

"Resolved that the written option, dated July 2, 1928, and made by the President and Secretary of the company, in behalf of Minnesota Tea Company to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying said option, be and hereby are ratified, confirmed, and approved, and that the actions of the President and Secretary in giving and executing such option and in signing and executing such agreement modifying said option be and are hereby in all things ratified, confirmed, and approved.

Resolved Further that the assets of Minnesota Tea Company described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee in pursuance of and under such option and agreement modifying the same and on the terms therein stipulated and thereby agreed and stipulated, and upon such other terms as may be deemed advisable by the Board of Directors, or by the President thereto authorized by the Board of Directors, and that any other assets, if any there be, owned by, or in the disposition of, Minnesota Tea Company be sold, or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

Resolved Further, That the Board of Directors be and hereby are authorized and directed to effect and make such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the considerations stipulated in said option and agreement modifying same, or upon such other terms as the Board of Directors or the president by the Board thereto authorized, may deem advisable.

27

Resolved Further that the Board of Directors, in order to effect such sale of said assets of this company and to carry out the terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and are hereby authorized and directed to cause to be executed and delivered to the purchaser of said assets, in behalf of Minnesota Tea Company, and bill of sale, assignments, agreements or other instruments by the President and the Secretary and to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

Resolved Further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such

sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders, whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent.

Resolved Further that Minnesota Tea Company shall continue to hold and own the said corporate stock and securities without the sale or distribution thereof.

Therefore, resolved, that for the purpose of carrying out the plan of corporate reorganization adopted, authorized, and directed by the stockholders at their said meeting this day by the passing and adoption of the said resolution by them at their said meeting, the written option, dated July 2, 1928, and made by the President
28 and Secretary of the company, in behalf of Minnesota Tea Company, to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying the said option, be and hereby are ratified, confirmed, and approved, and the actions of the President and Secretary in giving and executing said option and agreement modifying the same are in all things ratified, confirmed, and approved, and that the assets of Minnesota Tea Company, described in said option, being all, or substantially all the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee, in pursuance of and under said option and agreement modifying the same and on the terms therein stipulated and thereby agreed and for the considerations therein and thereby stipulated, or upon such other terms as may be deemed advisable by the President, and that any other assets, if any there be, owned by, or in the disposition of Minnesota Tea Company, be sold or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

Resolved Further that such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the consideration stipulated in said option and agreement modifying the same, or upon such other terms as the President may deem advisable, be made and effected, and that the President, or Vice President, and the Secretary, in order to effect such sale of said assets of this company and to carry out the terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and hereby are authorized and directed to execute in behalf of Minnesota Tea Company any bill of sale, assignments, agreements, and other instruments required to effect such sale and transfer, and also for

such purpose to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

Resolved Further that for the purpose of carrying out said plan adopted by the stockholders at said meeting of the stockholders, all money received by Minnesota Tea Company on the sale of its said assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in proportion to their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and
29 securities received by it for its assets on such sale thereof without being compelled to sell any part of such stock and securities for the payment of existing debts, and that a contract or agreement in writing shall be entered into by this company with its stockholders and signed by and in behalf of this company and its stockholders, whereby all the said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities received on said sale of its assets without being compelled to sell any part thereof for the payment of its existing debts, shall agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent and further that the President be and hereby is authorized and directed to sign and execute such written agreement in behalf of Minnesota Tea Company with the stockholders of the company.

Resolved Further that for the purpose of carrying out said plan adopted by the stockholders, Minnesota Tea Company continue to own and hold the said corporate stock and securities received by it on the sale of its assets without the sale or distribution thereof."

No further business came before the meeting and on motion, duly seconded and carried, the Board then adjourned to meet on call of the President.

(Signed) A. F. PETERSON,
Secretary.

Attest:

(Signed) E. C. PETERSON,
President.

We, being all the Directors, hereby certify that the foregoing minutes are true and correct.

(Signed) E. C. PETERSON,
L. T. PETERSON,
A. F. PETERSON,
Directors.

Exhibit "D"

Agreement Supplemental to Option Dated July 2, 1928, for the Purchase of Minnesota Tea Company Property, Exercised July 6, 1928.

This Agreement, Made this 24th day of July 1928 by and between Minnesota Tea Company, a Minnesota corporation, hereinafter called the Seller, and O. B. Westphal, Esq., of Chicago, Illinois, hereinafter called the Buyer,

Witnesseth:

Whereas, by an instrument in writing dated July 2, 1928, the Seller heretofore granted an option to the Buyer for the purchase of certain assets of the Seller, for the consideration therein set forth, and the Buyer thereafter, on July 6, 1928, exercised said option; and

Whereas, it is desired to have the calculations required by paragraphs Fifth and Sixth of said exercised option made as of August 4, 1928, rather than as of the delivery date referred to in said exercised option, it being the desire of the parties to avoid any further expense of accounting between said August 4, 1928, and the delivery date herein agreed upon;

Now, Therefore, It is Agreed by and between the parties hereto (any act done hereunder or any promise made herein by one of the parties to be taken as full and complete consideration for each and every promise made herein by the other party) as follows:

1. The delivery date referred to in said option is hereby extended to and including August 25, 1928.

2. It is agreed, however, that the calculations required by the Fifth and Sixth paragraphs of said option shall be made as of the end of August 4, 1928.

3. Between said August 4, 1928, and the said delivery date of August 25, 1928, as herein agreed, the Seller shall remain in possession and management of its business, directing the same from its principal office at Duluth, Minnesota. All receipts during said period shall be deposited in a bank account to be opened in the name of "Minnesota Tea Company Special Account."

All expenses during said period shall be paid by checks drawn upon said account. At the close of said period any balance remaining in said special account shall be turned over to the Buyer or his nominee, and any deficit which may exist at that time in said account shall be absorbed by the Buyer, it being the intention hereof to cause the operation of said Minnesota Tea Company to be for the account of the Buyer during said period from the end of August 4, 1928, to and including the delivery date of August 25, 1928, in the event the sale of assets contemplated by said exercised option is consummated, and to cause the operation of said Minnesota Tea Company to be for the account of the Seller during said period from the end of August 4, 1928, to the delivery date in the event the sale of assets contemplated by said exercised option is not consummated.

4. It is further agreed that the assets covered by said exercised option shall include, instead of exclude, all bills, notes, and accounts receivable which the parties to said option and hereto shall consider doubtful, but that in arriving at the price to be paid for the property covered by said option as thus modified, the books of the Minnesota Tea Company shall govern and the bills, notes, and accounts receivable which the parties hereto shall consider doubtful shall be deducted from the face value of corresponding items carried on such books at August 4, 1928, and in figuring the value of the assets as of December 31, 1927, the same percentage for doubtful items shall be deducted from the face value of corresponding items carried on such books at December 31, 1927, in order to determine whether the total purchase price shall be reduced or increased as provided in paragraphs Fifth and Sixth of said option.

5. It is further agreed that the Buyer does now, in good faith, make full inquiry of the Seller as to the names and places of residence and business of the Seller's creditors and the amount owing to each, and requests that a list thereof be furnished to him or his nominee on or before the 18th day of August 1928.

6. It is hereby agreed that the purchase contemplated by said exercised option, as herein modified, will be exercised for and on behalf of the Buyer by his nominee, The Grand Union Company.

7. The five days' notice in writing of delivery date provided for in said option is hereby waived, August 25, 1928, having been herein agreed upon as such delivery date.

The said option of July 2, 1928, given by the Seller to the Buyer and so exercised is in full force and effect except as herein modified.

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President and*
A. F. PETERSON, *Secretary.*
O. B. WESTPHAL [SEAL]

32 *Exhibit "E"*

A duly called meeting of the Stockholders of Minnesota Tea Company was held at its office and principal place of business at Duluth, Minnesota, on the 23rd day of August 1928, at 10 o'clock in the forenoon.

E. C. Peterson, L. T. Peterson, and A. F. Peterson constituting all the Stockholders of said Company were present at the meeting. E. C. Peterson, the President of the Company, presided at the meeting and A. F. Peterson, the Secretary of the Company, acted as Secretary thereof.

Upon motion duly made and seconded and unanimously carried, the following resolution was adopted:

Resolved that the written option dated July 2, 1928, given by this Company, signed by its President and Secretary, to O. B. Westphal, and the modification agreement made by this Company and signed in its name by its President and Secretary and by said O. B.

Westphal, dated July 24th, 1928, be and are in all respects ratified, confirmed, and approved, and the actions of the officers of the Company in executing and delivering said option and modification are ratified, confirmed, and approved.

Resolved further, that the President or Vice President and Secretary of this company be and they are hereby authorized and directed to execute and deliver to The Grand Union Company, a Delaware corporation, bill of sale and instrument transferring the property covered by said option as modified and covering the agreements therein provided for, and they are hereby authorized and directed to execute and deliver the bill of sale, conveyance, and agreement with The Grand Union Company now presented to this meeting, and that in closing said matter they are authorized to make any changes in form or substance of said instruments that they may deem advisable in carrying out the general plan and purpose of said option to said O. B. Westphal as so modified, which has been assumed by said The Grand Union Company, and they are authorized and directed to execute and deliver any other instruments in general carrying out the purpose and intent of said option to said O. B. Westphal as so modified, and their action taken in this regard is approved and confirmed.

33 There being no further business to come before the meeting, the meeting adjourned.

(Signed) E. C. PETERSON,
President.

Attest:

(Signed) A. F. PETERSON,
Secretary.

Exhibit "F"

Minutes of the Special Meeting of the Stockholders of Minnesota Tea Company Held June 18, 1928, at Ten O'Clock in the Forenoon at the Office of the Company, 2021 West Superior Street, Duluth, Minn.

Pursuant to a call of the President of the Company, a special meeting of the Stockholders of the corporation was held at the office of the Company, 2021 West Superior Street, in the City of Duluth, Minnesota, at ten o'clock in the forenoon, on June 18th, 1928, after all the Stockholders in writing mutually agreed and consented to such special meeting required by the Statutes of Minnesota, and the By-Laws of the Company.

All the Stockholders were present during the meeting and participated in the same.

E. C. Peterson presided and A. F. Peterson acted as Secretary at the meeting.

The President reported to the meeting that it was advisable to bring about a corporate reorganization by the formation of a new corporation under the laws of Minnesota, to which Minnesota Tea Company should transfer all life insurance owned by it and all its

real estate and the buildings thereon and all the unexpired fire insurance on such buildings and the corporate stock of Hotel Duluth Company held by Minnesota Tea Company, all in consideration of corporate stock of such corporation to be organized in an amount approximately equal to the book value of the property so transferred, less all the incumbrances thereon, to be assumed and paid by the new corporation and transferee, such corporate stock in the new corporation to be immediately assigned and distributed to the Stockholders of Minnesota Tea Company ratably and in proportion
34 to their respective stock holdings of the stock of Minnesota Tea Company and without the surrender by such Stockholders of any of their stock in Minnesota Tea Company.

After a discussion of such plan of corporate reorganization by the meeting for the purpose of carrying out such plan the following written resolution was read and its adoption was moved, seconded, and unanimously carried and adopted by a vote of all the stockholders:

"Resolved, that a corporation shall be organized under the laws and statutes of the State of Minnesota to be named 'Peterson Investment Company' with a capital stock of two hundred thousand dollars.

"Resolved further, that after the incorporation of Peterson Investment Company all the life insurance of Minnesota Tea Company and all its real estate, including all buildings, and all unexpired fire insurance on such buildings and the corporate stock of Hotel Duluth Company held by Minnesota Tea Company be transferred to Peterson Investment Company in consideration of corporate stock of Peterson Investment Company to be issued to Minnesota Tea Company in an amount approximately equal to the book value of the property so transferred, less all incumbrances thereon, which are to be assumed by Peterson Investment Company, such stock to be immediately distributed to the respective stockholders of Minnesota Tea Company ratably and in proportion to their respective stock holdings in Minnesota Tea Company.

"Resolved further, that the Board of Directors be and are hereby authorized and directed to forthwith proceed to take all necessary steps for the speedy incorporation of Peterson Investment Company with an authorized capital stock of two hundred thousand dollars with corporate powers to own, acquire, buy, sell, and deal in personal and real property of every nature and description and to invest its property and the proceeds therefrom in other property, including stocks, bonds, and other securities, and to do anything incidental, necessary, or profitable in carrying on such business and with all other corporate powers which the Board of Directors, or such person to whom the Board of Directors may entrust such incorporation, after consultation with legal counsel, may deem advisable for the purposes of such corporate powers and business.

"Resolved further, that after the incorporation of Peterson Investment Company the Board of Directors of Minnesota

Tea Company proceed with all expediency to transfer as
35 aforesaid all the said property of Minnesota Tea Company to Peterson Investment Company for corporate stock of Peterson Investment Company in amount equal to approximately the book value of said property so transferred less the amount of the incumbrances thereon, to be issued to Minnesota Tea Company, and then immediately assign and transfer and distribute all such stock to the respective stockholders of Minnesota Tea Company ratably and in proportion to their respective stock holdings in Minnesota Tea Company without the surrender by such stockholders of any of their stock in Minnesota Tea Company."

It was then moved, seconded, and carried that the written consent of the stockholders to the holding of the special meeting and of the waiver of all notice of the holding thereof and the written resolution adopted at the meeting be copied into the minutes of the meeting and the original written consent and the original written resolution adopted be filed with the files and the records of the company.

The said written consent and waiver were in words as follows:

We, the undersigned, being all the stockholders of Minnesota Tea Company, do hereby mutually consent to the holding of a special meeting of Minnesota Tea Company and its stockholders at the office of the corporation, 2021 West Superior Street, in the city of Duluth, Minnesota, on June 18th, 1928, at ten o'clock in the forenoon, for any purpose that may affect the corporation and its business, so called by the president, and we waive all and any notice of such meeting required by the status of the State of Minnesota or by the by-laws of the corporation.

Dated June 18th, 1928.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

On motion the meeting then adjourned.

(Signed) A. F. PETERSON,
Secretary.

Attest:

(Signed) E. C. PETERSON,
President.

The undersigned stockholders of Minnesota Tea Company hereby certify to the correctness of the above minutes.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

36 *Bill of sale, Minnesota Tea Company to The Grand Union Company*

Know All Men By These Presents That Minnesota Tea Company, a Minnesota corporation, first party, in consideration of the sum of One Dollar ($1.00) and other valuable considerations (the exact

consideration to be determined and paid in accordance with an option agreement made by Minnesota Tea Company and O. B. Westphal, dated July 2, 1928, as modified by supplemental agreement dated July 24, 1928, between said tea company and said Westphal), does hereby grant, bargain, sell, and convey unto The Grand Union Company, a corporation of the State of Deleware, second party, its successors and assigns, forever, the following-described goods, chattels, and personal property, to-wit:

All assets of every kind and description owned by first party upon the 4th day of August 1928, excepting real estate, buildings, fixtures, cash, and the interest of first party in any insurance policies on the lives of any and all of its officers and excepting insurance on buildings and fixtures which it may have owned on August 4th, 1928, but including the good will and all trade marks and trade names and the right to use the name of "Minnesota Tea Company," and including all automobiles and all machinery and instrumentalities heretofore used in its business, even though such machinery and instrumentalities may be attached to the buildings, and including all bills, notes and accounts receivable of every description owned by the first party on August 4th, 1928, whether considered doubtful or not, and including all moneys deposited in the bank account heretofore opened in the name of "Minnesota Tea Company Special Account" as provided in said agreement of July 24, 1928, and including all assets of which first party was in possession on August 4th, 1928, through purchase or agreement of purchase, even though the technical legal title might not have passed to it, other than the above excepted items, and including all property of whatsoever kind or description which the first party owns at the date of this instrument.

An inventory of the merchandise, certified under the name of first party by its president, which is covered by this bill of sale is hereto attached and made a part hereof, and a summary of the accounts and bills receivable covered by this bill of sale is also hereto attached and made a part hereof, and a list of the automobiles and trucks covered by this bill of sale is also hereto attached and made a
37 part hereof; but the fact that said specific lists of merchandise, accounts and bills receivable and automobiles is attached shall not be deemed to exclude any of said items that may have been omitted from said lists, the intention hereof being to include all of the property above described as covered by this bill of sale, whether specifically mentioned in said lists or not.

To Have and To Hold unto the second party, its successors and assigns, Forever. And the first party, for itself and its successors, does covenant and agree to and with the second party, its successors and assigns, to warrant and defend the sale of said goods, chattels, and personal property and the rights hereby conveyed, unto the second party, its successors and assigns, against all and every person and persons whomsoever, lawfully claiming or to claim the same or any lien or interest therein or right thereto, and covenants that all of said property is free from any encumbrance.

And the first party further covenants that it has not disposed of any of its assets or collected any accounts receivable, other than in the normal conduct of its business, since July 2, 1928, and that in case it is owing any amounts on any of the property covered by this bill of sale then it shall pay and discharge such amounts, it being understood and agreed that any bills incurred since August 4, 1928, for any purchase of merchandise or expense of running the business are to be absorbed by the second party, it being the understanding and agreement that the said business has been operated for the account of the second party since August 4, 1928, to and including the delivery date hereof as of August 25, 1928. First party further agrees, for the considerations aforesaid, immediately to change its name to a name satisfactory to second party and that it will not hereafter engage in the Wagon Route tea and coffee business in any part of the United States, and for the considerations aforesaid first party further agrees that it will not, for a period of one year from August 25, 1928, dispose of any of the voting trust certificates to be received by it, other than to its stockholders, and that if it disposes of any of the same to any of its stockholders it will cause them, at the time of the acquisition, to enter into an agreement with second party that for such period they will not sell or dispose of any of the same to be acquired by them.

38 In Witness Whereof first party has caused this instrument to be executed, in its corporate name, by its proper officers and its corporate seal to be hereunto affixed, this 23rd day of August 1928.

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President.*
And A. F. PETERSON, *Secretary.*

Signed, Sealed, and Delivered in Presence of:
W. D. BAILEY,
S. H. ECKMAN.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 23rd day of August 1928, before me, a Notary Public within and for said County, personally appeared E. C. Peterson and A. F. Peterson, to me personally known, who, being by me duly sworn, did say that they are respectively the President and the Secretary of Minnesota Tea Company, the corporation named in the foregoing instrument, that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said E. C. Peterson and A. F. Peterson acknowledged said instrument to be the free act and deed of said corporation.

EDITH SUNDHOLM,
Notary Public.

St. Louis County, Minn.
My commission expires Sept. 16, 1931.

Full Detailed Inventory of Each Article of Merchandise to be Included in the Sale of Assets From Minnesota Tea Company to the Grand Union Company. Required by Section 8473 of the Statutes of the State of Minnesota, Relating to Bulk Sales.

DULUTH, MINNESOTA,
August 17, 1928.

THE GRAND UNION COMPANY;
c/o Messrs. Washburn, Bailey & Mitchell,
1200 Alworth Bldg., Duluth, Minnesota.

GENTLEMEN:

The undersigned, Minnesota Tea Company, the Seller of certain assets in a sale to be consummated with you as the
39 buyer, hereby submits a full detailed inventory of each article of merchandise to be included in such sale, showing the quantity, and so far as possible with the exercise of reasonable diligence, the cost price to the undersigned of such articles of merchandise. In connection with the full detailed inventory hereby submitted, the undersigned, the seller in the sale, desires to state that all quantities are based upon a physical inventory taken Saturday, August 4th, 1928, is being impracticable and almost impossible to complete another inventory of each article of merchandise to be covered by said sale, prior to the consummation thereof.

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PRODUCTS			
Green Coffee			
Santos, Bourbon	121,800 lbs.	23.75¢	$28,951.00
Maracaibo	11,750 "	26.38	3,099.65
Mexican	27,570 "	29.14	8,033.90
Bogata, Medelin Excels	43,592 "	28.47	12,410.64
Roasted Coffee			
Packaged			
No. 1, Ground	78 lbs.	33.32	25.21
Do. Whole	21 "	33.32	6.78
No. 2, Ground	269 "	31.44	116.01
Do. Whole	44 "	31.44	13.83
No. 3, Ground	6,100 "	30.82	1,880.02
Do. Whole	2,106 "	30.82	649.07
No. 4, Ground	534 "	28.53	152.35
Do. Whole	246 "	28.53	70.18
Mintes, Ground	2,993 "	31.47	941.89
Do. Whole	596 "	31.47	187.56
Hotel Special, Ground	430 "	31.77	136.61
Hotel Special and Combination, Ground	549 "	30.15	165.52
Blackstone, Ground	57 "	32.06	18.27
Do. Whole	3 "	32.06	.96

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PRODUCTS—Continued			
Roasted Coffee—Continued			
Bulk			
No. 1, Ground	3 lbs.	32.32¢	$0.97
Do. Whole	211 "	32.32	68.19
No. 2, Ground	19 "	31.44	5.98
Do. Whole	156 "	31.44	49.04
No. 3, Ground	278 "	30.32	84.13
Do. Whole	319 "	30.32	96.71
No. 4, Ground	478 "	28.53	136.37
Do. Whole	246 "	28.53	70.19
40 Hotel Special, Ground	207 "	31.77	65.76
Hotel Special and Combination, Ground	55 "	30.15	16.58
Blackstone, Ground	97 "	32.06	31.10
Tea			
Bulk			
Orange pekoe #200	100 lbs.	52.00	52.00
Do. #300	50 "	57.00	28.50
Japan #400	53 "	24.5	12.98
Do. #600	37 "	37.5	13.87
Ceylon #25	183 "	24.5	44.83
Do. #100	292 "	43.5	127.02
Gunpowder #700	262 "	40.5	106.11
English breakfast #4	30 "	24.5	7.35
Japan tea siftings	32 "	10	3.20
Tea Bags			
Orange Pekoe	20,250 only		102.44
Japan	21,250 "		51.54
Packaged			
Orange pekoe, 13—1# #200	13 lbs.	52.00	6.76
Japan, 2—½# #400	1 "	24.5	.25
Do. 27—1# #400	27 "	24.5	6.61
Do. 38—½# #500	19 "	40.5	7.70
Do. 1,779—1# #500	1,779 "	40.5	720.49
Do. 339—1# #600	339 "	43.5	103.34
Ceylon, 70—½# #25	35 "	24.5	8.57
Do. 86—1# #25	86 "	24.5	21.06
Do. 2—½# #100	1 "	43.5	.44
Do. 1,217—1# #100	1,217 "	43.5	529.39
Gunpowder 4—½# #700	2 "	43.5	.87
Do. 15—1# #700	15 "	43.5	6.52
Oolong, 2—½#	1 "	42.5	.43
English breakfast 1—1#	1 "	24.5	.24
Lipton, 23—1#	23 "	42.5	9.77
Japan tea siftings, 1—1#	1 "	10	.10
Bulk products			
Peanuts	5,862 lbs.	12.00	703.44
Rice	5,946 "	5.62	334.21
Cocoa	990 "	14	138.60
Cocoanut shredded	226 "	22.5	50.11
Sago	178 "	6.5	11.57
Tapioca	325 "	6.5	21.13
Farina	348 "	4.75	16.53
Barley	14 "	4	.56

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PRODUCTS—Continued			
Foodstuffs			
Rice	447 lbs.	3.62½	$16.18
Oats	996 "	11.2	111.55
Cream of wheat	20 "	4.75	.95
Sago	4 "	6.5	.26
Tapioca	8 "	6.5	.52
Farina	22 "	4.75	1.05
Barley	18 "	4.00	.72
Macaroni 8 oz.	3,792 pkg.	5.5	208.56
Spaghetti 8 oz.	7,060 "	5.5	389.40
Noodles 4 oz.	3,336 "	5.5	183.48
Corn flakes 13 oz.	1,548 "	9.3	143.96
Potato flour 1#	707 "	10	70.70
Catsup, pint 14 oz.	21 btl.	10.6	2.23
Do. gal.	75 "	61.5	40.12
Salt, 10# sack	333 sacks	14.6	48.62
Iodized salt 3# pkg.	835 pkg.	8.2	51.77
Peanut butter 16 oz.	757 jars	10	75.70
Salty crackers 4½# pkg.	321 pkg.	63	202.23
Do. 2½# "	199 "	25	66.15
Graham crackers 2# "	216 "	32	69.12
Ginger snaps 3# "	96 "	50	48.00
Cream toast 5# "	95 "	70	66.50
Cinnamon toast 5# "	338 "	70	236.60
Codfish	28 cans	23	6.44
Sardines	2,942 tins	8	235.36
Mince meat	367 jars	30	110.10
Tomatoes	6,128 cans	15	919.20
Corn	3,564 "	11.2	399.17
Peas	1,936 "	13.3	257.49
Salad mustard	429 jars	9.3	39.90
Horse-radish mustard	538 "	9.3	50.03
Baking powder 1#	890 cans	9.1	80.99
Do. 5#	31 "	52	16.12
Cocoa 1#	241 jar	14	33.74
Bitter chocolate ½#	533 bars	28	149.24
Sweet chocolate	268 "	29	78.01
Cocoanut	35 lbs.	23.5	8.23
Postum	187 can	17	31.79
Instant postum 8 oz.	78 "	34.5	26.22
Baking soda 1#	948 "	6	56.88
Marshmallow cream 10 oz.	447 "	11.4	50.96
Whole			
Pepper 3 oz.	144 can	10.00	14.40
Allspice 3 oz.	241 "	5	12.05
Cinnamon 3 oz.	1 "	4.8	.06
Cloves 3 oz.	148 "	8	11.68
Do. 8 oz.	3 "	20	.60
Nutmeg 3 oz.	2 "	42	.84
Cardamon seed 1 oz.	25 "	7	1.75
Do. 3 oz.	82 "	20	16.40
42 Caraway seed 3 oz.	275 "	5.6	15.40
Anise seed 3 oz.	92 "	7.5	6.90
Fennel seed 3 oz.	101 "	5.8	5.86
Stick cinnamon 3 oz.	191 "	8.5	16.41
Pickling, mixed 3 oz.	111 "	8	8.88
Do. 8 oz.	8 "	15	1.20

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PRODUCTS—Continued			
Extracts			
Vanilla 4 oz.	1,059 btls.	13.70¢	$145.08
Do 8 oz.	829 "	21.2	175.75
Do 16 oz.	178 "	40.8	72.62
Lemon 2 oz.	220 "	17.5	38.50
Do 4 oz.	288 "	28.3	81.50
Do 8 oz.	87 "	47.5	41.32
Do 16 oz.	32 "	84.5	27.04
Do 32 oz.	12 "	162.5	19.50
Almond 2 oz.	136 "	10.8	14.69
Do 4 oz.	59 "	20	11.80
Do 16 oz.	2 "	38	.76
Wintergreen 2 oz.	37 "	17.5	6.47
Raspberry 2 oz.	108 "	17.5	18.90
Orange 2 oz.	25 "	17.5	4.37
Pineapple 2 oz.	56 "	17.5	9.80
Banana 2 oz.	117 "	17.5	20.47
Strawberry 2 oz.	87 "	17.5	15.22
Maple 2 oz.	19 "	17.5	3.32
Rose 2 oz.	6 "	17.5	1.05
Peppermint 2 oz.	32 "	17.5	5.60
Spices			
Ground			
Pepper 3 oz.	520 can	10.00	52.00
Do 8 oz.	383 "	29.7	113.75
Do 16 oz.	24 "	57	13.68
Allspice 3 oz.	207 "	7.5	15.53
Do 8 oz.	104 "	16.6	17.26
Do 16 oz.	52 "	31.6	16.43
Cinnamon 3 oz.	212 "	7.1	15.05
Do 8 oz.	260 "	17.1	44.46
White pepper 3 oz.	305 "	16.6	50.63
Do 8 oz.	111 "	41	45.51
Do 16 oz.	7 "	79.6	5.57
Cloves 3 oz.	194 "	8.4	16.30
Do 8 oz.	98 "	20.4	19.99
Do 16 oz.	27 "	39	10.53
Mustard 3 oz.	230 "	8.5	19.55
Do 8 oz.	105 "	18.3	19.22
Do 16 oz.	30 "	31.4	9.42
Ginger 3 oz.	103 "	7.7	7.93
Do 8 oz.	81 "	19	15.39
Do 16 oz.	23 "	35.5	8.16
43 Nutmeg 3 oz.	200 "	10.7	21.40
Do 8 oz.	142 "	26.5	37.63
Do 16 oz.	20 "	46.8	9.36
Cayenne pepper 3 oz.	38 "	8.	3.04
Do 8 oz.	23 "	19.4	4.46
Jamaica ginger 3 oz.	49 "	8.2	4.02
Do 8 oz.	2 "	20.	.40
Do 16 oz.	3 "	38.5	1.15
Cream of tartar 1¼ oz.	17 "	4.6	.78
Do 8 oz.	5 "	21.1	1.05
Thyme A 3 oz.	100 "	6.7	6.70
Paprika 3 oz.	173 "	8.6	14.88
Do 8 oz.	2 "	20.4	.41
Sage 3 oz.	309 "	5.7	17.61

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PRODUCTS—Continued			
Spices—Continued			
Ground—Continued			
Mace 1 oz.	135 "	9.7¢	$13.09
Celery salt 1¼ oz.	102 "	5.9	6.02
Saffron 1/32 oz.	94 "	10.4	9.77
Curry powder 1 oz.	29 "	5.9	1.71
Poultry seasoning 2 oz.	48 "	4.5	2.16
Corn starch 1#	909 can	7.00	63.63
Hard tack	94 pkg.	15.	14.10
Pectin	14 "	22.	3.08
Figs 2#	1,271 "	52.	660.92
Peanuts	50 lbs.	12.	6.00
Olives	525 jar	49.	257.25
Jello	1,000 pkg.	6.	60.00
Trujell	1,700 "	22.	374.00
Root beer 3 oz.	170 btl.	5.8	9.86
Prunes 2#	413 pkg.	17.5	72.28
Do. Pansy 48#	93 box	420.	390.60
Do. Santa Claus 10#	278 "	92.5	257.15
Jams			
Strawberry	1,369 jar	71.00	971.99
Raspberry	367 "	71.	260.57
Plum	124 "	71.	88.04
Cherry	889 "	80.1	712.09
Peach	4 "	74.1	2.96
Grape	77 "	63.3	48.74
Apricot	48 "	74.1	35.57
Pineapple	1 "	67.6	.68
Custard Powders			
Cream	357 pkg.	17.90	63.90
Lemon	361 "	17.9	64.62
Butterscotch	363 "	17.9	64.98
Chocolate	353 "	17.9	63.18
Summer Drinks			
Nectar Wild cherry	806 btl.	23.00	185.38
Do. Grape	280 "	23.	80.80
Do. Raspberry	438 "	23.	100.74
" Do. Strawberry	357 "	23.	82.11
Do. Punch	39 "	25.	9.75
Candy			
Tinshell	345 can	52.00	179.40
Black Walnut puffs	3 "	80.	2.40
Toilet Soaps, Etc.			
Vegetable	1,334 bar	3.90	57.03
Complexion	2,073 "	3.6	74.62
Sweet sixteen	7,105 "	3.6	255.78
John D	1,009 can	18.7	188.68
Verion	1,304 bar	3.6	46.94
Koko	43 "	3.6	1.51
Green	12 "	3.6	.43
Olive	12 "	4.2	.50
Castile	338 "	2.2	7.43

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
Products—Continued			
Toilet Soaps, Etc.—Continued			
Tar	671 bar	3.66	$24.15
Pumice	294 "	3.4	9.99
Tooth paste	343 tube	10.	34.30
Bath powder	5 copt.	10.	.50
Lotion	1,212 btl.	20.	242.40
Do.	6 "	30.	1.80
Castilla shampoo	2,142 "	16.6	355.37
Toilet water	36 "	25.	9.00
Bath talcum	141 can	12.	16.93
Soaps and Cleansers			
Wool	11,196 cake	3.50	391.86
Washing	16,230 "	3.5	568.05
Soap chips	1,748 box	20.	349.60
Kao ammonia compound	90 "	9.5	8.55
Lavo dry ammonia	579 can	4.6	26.63
Cyclone cleanser	69 "	36.	24.84
Steel wool	1,584 box	12.6	199.58
Swift cleanser	95 can	26.5	25.17
No-soot-o	324 "	8.3	26.89
Blusing	187 btl.	5.3	9.91
Laundry starch	720 pkg.	6.5	46.80
Electric starch	156 "	8.3	12.98
Washing powder	3,343 "	12.5	417.877
Scouring powder	4,659 "	3.5	163.0
Washing tablets	216 "	7.	15.12
Zolgon	1 btl.	30.	.30
Syrups			
Honeymoon	64 pail	43.30	27.71
Maple and cane	61 can	70.	42.70
Malt	56 "	37.5	21.00
Sundry			
Silver cream polish	199 can	14.30	28.45
Pinol sewing machine oil	153 can	9.4	14.38
Metal glaze	132 can	25.	33.00
Cedar oil	109 btl.	16.9	18.09
Wondoro furniture polish	1,031 "	12.5	128.87
Ointment	1,422 "	13.8	197.02
Jar rings	2,997 box	3.1	92.85
Matches	2,393 "	3.1	76.13
Wax paper	873 roll	10.8	94.30
Do. holder	37 only	7.8	2.10
Coffee urn	238 "	5.	11.90
Do.	404 "	6.	24.27
Goff's Tonic	4,932 btl.	30.1	1,482.90
Surlax	92 box	10.	9.20
Toilet paper, crepe	879 roll	6.5	44.07
Do. Mayflower	3,158 "	7.6	242.06
Premiums			
Modesta Bird—D-3080-M			
Cups	456	$0.22	100.32
Saucers	464	.22	102.08
6" plate (B. B.)	209	.18	37.62
5" " (Tea)	188	.20	44.83
7" " (Bkfst)	170	.38	64.60

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Modesta Bird—D-2580-M—Continued			
8" plate (Dinner)	272	$0.44	$119.68
Sauce scallop dish (Salad)	1	1.16	1.16
Covered Butter dish	1	.90	.90
Sugar Bowl	12	.98	11.76
Creamer	10	.58	5.80
Milk jug (Pitcher)	1	1.04	1.04
Coupe soup plates	253	.38	96.14
Celery dish	11	1.28	14.08
8" salads (salad)	24	1.16	27.84
Soup bowl	1	.38	.38
Pitcher	5	1.04	5.20
Oat meal dish	12	.24	2.88
7" baker	10	.82	8.20
8" "	21	1.11	23.31
Pickle dish	6	.42	2.52
Gravy f. s.	8	1.20	9.60
10" platter	24	1.18	28.32
12" "	7	1.44	10.08
14" "	6	2.10	12.60
Cake plate	18	.86	15.48
Chop plate	12	1.34	16.08
Covered Casserole	1	2.45	2.45
46 4" fruit	318	.17	54.06
5" "	83	.17	14.11
5404—Bavarian—#8			
Cups	360	.15	54.00
Saucers	406	.15	60.90
4" plates	109	.15	16.35
6" "	254	.20	50.80
7" "	98	.26	25.48
8" "	163	.32	52.16
Covered butter dish	4	.64	2.56
Sugar bowl	14	.54	7.56
Creamer	14	.30	4.20
Coupe soup plate	350	.26	91.00
Rim soup plate	1	.26	.26
Oatmeal	112	.19	21.28
Covered dish	4	1.82	7.28
Covered casserole	5	1.82	9.10
Pickle dish	13	.41	5.33
Sauce bowl f. s.	17	1.09	18.53
10" Platter	11	.73	8.03
12" Platter	13	1.19	15.47
14" Platter	8	1.66	13.28
4" Fruit	118	.14	16.52
8" Nappie (Baker)	1	.77	.77
7" Salad	11	.48	5.28
8" Salad	12	.52	6.24
Tea Pot	1	1.17	1.17
Cake Dish	2	.49	.98
8" Bakers	13	.77	10.01
#0 Servia			
Cups	1,143	.16	182.88
Saucers	1,029	.16	164.64
4" Plate	57	.16	9.12
5" Plate	12	.16	1.92

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
#9 Servis—Continued			
6" Plate	30	$0.24	$9.36
7" Plate	3	.30	.90
8" Plate	1	.36	.36
Creamer	1	.55	.55
Camp. Soups	1	.30	.30
Oatmeal	1	.20	.20
4" Fruit	33	.12	3.96
Covered casserole	1	2.38	2.38
7" Nappie	1	.48	.48
6" Baker	1	.40	.40
8" Baker	2	.71	1.42
Bowl—regular	2	.40	.80
8" Platter	3	.48	1.44
10" Platter	3	.71	2.03
12" Platter	1	1.19	1.19
#0429 Bavarian			
Cups	59	.28	16.52
Saucers	56	.28	15.68
4" Plate	57	.21	11.97
5" Plate	45	.26	11.96
6" Plate	5	.36	1.80
8" Plate	27	.45	12.15
Cake	1	.90	.90
8" Scallop	1	1.04	1.04
7" Scallop	1	.81	.81
Sugar bowls	2	1.65	3.30
Covered dish	1	3.70	3.70
Bowl	1	.63	.63
Creamer	1	.95	.95
Sauce bowl f. s. round	2	1.80	3.60
Chop plate	5	1.80	9.40
#0429—Bavarian			
Covered butter dish	1	1.75	1.75
Fruit dish	61	.31	12.81
Pickle dish	3	.63	1.89
Round covered casserole	1	3.70	3.70
Sauce bowl f. s. (oval)	1	3.30	3.30
Coupe soups	1	.30	.30
Oatmeal	23	.26	5.98
9" Platter	5	1.04	5.20
10" Platter	4	1.23	4.92
12" Platter	4	1.56	6.24
6" Plates	13	.36	4.32
7" Baker	1	1.23	1.23
Vegetable dish (baker)	2	1.23	2.46
Oyster bowls	3	.63	1.89
Soups	6	.56	3.36
7" Nappies	4	.81	3.24
9" Nappies	1	1.04	1.04
#709—Bavarian #7			
Cups	25	.26	6.50
Saucers	16	.26	4.16
4" Plate	26	.20	5.20
6" Plate	3	.29	.87

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
8709—Bavarian #7—Continued			
6" Plate	1	$0.42	$0.42
4" Fruits	45	.19	8.55
7" Baker	2	.81	1.62
8" Baker	1	.90	.90
Coupe soup	1	.38	.38
10" Platter	1	1.00	1.00
12" Platter	5	1.75	8.75
Oatmeal dishes	2	.24	.48
Individual butter dishes	5	.12	.60
Covered butter dish	3	1.23	3.69
48 Gloria 27 G			
Cups	44	.11	4.84
Saucers	45	.11	4.95
Covered butter	2	.86	1.72
Pickle dish	2	.29	.58
Bowl	1	.20	.20
Creamer	6	.27	1.62
Sugar bowl	6	.58	3.48
4" Plates	45	.10	4.50
Gloria 27 G			
5" Plates	43	.11	4.73
6" Plates	24	.13	3.12
7" Plates	39	.17	6.63
Gravy f. s.	3	.86	2.58
Oyster bowl	1	.20	.20
8" Platter	6	.24	1.44
10" Platter	3	.43	1.29
12" Platter	3	.72	2.16
Covered casserole	1	1.15	1.15
7" Baker	5	.29	1.45
8" Baker	2	.43	.86
Soup bowl	1	.16	.16
4" Fruits	37	.07	2.59
5" Fruits	17	.15	2.55
Oatmeal	1	.13	.13
Coupe soups	11	.16	1.76
Gloria #548			
Cups	184	.09	14.76
Saucers	153	.09	13.95
Butter dishes—covered	1	.68	.68
Gravy f. s.	2	.68	1.36
Covered casserole	1	.90	.90
4" Plates	53	.08	4.24
5" Plates	68	.09	6.12
6" Plates	32	.10	3.20
7" Plates	137	.13	17.81
8" Dish	5	.19	.95
10" Dish	1	.34	.34
12" Dish	3	.56	1.68
4" Fruits	75	.06	4.50
5" Fruits	14	.12	1.68
Sugar bowl	10	.45	4.50
Creamer	14	.21	2.94
Pickle dish	3	.23	.69
7" Nappie	1	.23	.23

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
Premium—Continued			
Gloria #145—Continued			
8" Nappie	3	$0.34	$1.02
Baker	1	.34	.34
Oatmeal dish	8	.12	.96
Coup soup plate	30	.12	3.60
Bowl	2	.15	.30
60 Lafayette Pattern—Nautaka Japanese			
Cups	20	.25	5.00
Saucers	26	.26	6.76
Lafayette Pattern—Nautaka Japanese			
4" Plates	1	.20	.20
5" Plates	18	.37	6.66
6" Plates	3	.45	1.35
7" Plates	13	.50	6.50
10" Dish	1	1.63	1.63
12" Dish	1	2.34	2.34
14" Dish	2	3.40	6.80
Soup plate	1	.46	.46
Gravy l. s	1	1.63	1.63
Sugar bowl	1	.90	.90
Creamer	1	.67	.67
Covered butter dish	1	1.55	1.55
Oval baker	1	1.30	1.30
Oval covered dish	1	3.75	3.75
6" Fruits	27	.29	7.83
5" Fruits	5	.32	1.60
Coupe soups	23	.46	10.58
9" Plates	34	.53	17.08
Field English Ivory Set #14			
Cups	31	.15	4.96
Saucers	43	.15	6.45
4" Plate	51	.15	8.15
5" "	67	.19	12.05
6" "	19	.24	4.56
7" "	36	.30	11.40
8" "	33	.36	11.88
8" Nappie	3	.40	1.20
7" "	1	.40	.40
9" "	3	.71	2.13
7" Baker	3	.40	1.61
8" "	4	.71	2.85
8" Dish	1	.40	.40
12" "	1	.71	.71
12" "	6	1.19	7.14
Pickle dish	2	.48	.96
Tea-pot	1	1.35	1.35
Covered Casserole	3	2.38	7.14
6" Fruit	61	.12	7.32
Soup Bowl	1	.30	.30
Oyster Bowl	3	.40	1.19
Oat Meal Dish	1	.30	.30
Sauce Bowl l. s	3	1.38	3.15
Covered Butter Dish	3	1.43	2.86
Coup Soup	24	.30	23.70
4" Nappie	1	.40	.40

	Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
	PREMIUMS—Continued			
80	K 2013 Pattern #11			
	Cups	47	$0.59	$4.29
	Saucers	67	.09	6.03
	6" plates	81	.08	6.48
	8" "	107	.09	9.63
	7" "	118	.14	16.52
	6" fruits	239	.06	14.34
	8" "	51	.13	6.63
	Coupe soups	161	.13	20.93
	Covered casserole	3	.92	2.46
	Gravy	24	.32	7.68
	7" nappie	6	.24	1.44
	9" dish	8	.30	1.90
	10" "	4	.36	1.44
	12" "	5	.59	2.95
	Creamer	1	.24	.24
	Sugar bowl	3	.48	1.44
	Covered dish—oval	13	.90	11.40
	7" baker	2	.36	.72
	9" "	5	.36	1.80
	Covered butter dish	4	.71	2.84
	Pickle dish	5	.24	1.20
	7" Nappie	5	.24	1.20
	9" "	2	.36	.72
	Thin oyster bowl	32	.18	6.30
	East Lake #8			
	Cups	40	.17	6.80
	Saucers	41	.17	6.97
	6" plates	22	.19	4.19
	8" plates	26	.21	5.46
	9" plates	32	.25	8.00
	7" "	39	.31	12.09
	9" "	112	.40	44.80
	6" fruit	67	.13	8.71
	8" "	30	.31	9.39
	Pitcher	1	.87	.87
	Sauce bowl f. s.	3	1.67	5.01
	Sugar bowl	2	1.00	2.00
	Covered dish	1	2.50	2.50
	Pickle dish	1	.50	.50
	8" platter	3	.50	1.50
	12" "	3	.75	2.25
	7" baker	4	.42	1.68
	8" "	2	.50	1.00
	9" "	1	.75	.75
	7" nappie	2	.50	1.00
	8" "	5	.75	3.75
	Oyster bowl	1	.42	.42
	Pickle dish	2	.50	1.00
	Coupe soup	9	.31	2.79
	6" nappie	1	.42	.42
81	Individual butter dishes	6	.60	.36
	Milk jug	1	.87	.87
	Oat meal	1	.21	.21
	Creamer	2	.69	1.38
	Regular bowl	1	.42	.42

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
#61808—Pattern #6			
Cups	13	$0.16	$1.92
Saucers	57	.16	9.12
4" plates	40	.13	5.20
6" "	12	.18	2.16
7" "	4	.23	.92
4" fruits	3	.09	.27
Oatmeal	219	.25	54.75
Coupe soup	43	.26	11.18
8" dish	14	.32	4.48
9" baker	1	.58	.58
Sugar bowl	1	.80	.80
Creamer	1	.36	.36
Covered butter dish	4	1.31	5.24
7" nappie	6	.40	2.40
8" nappie	8	.66	5.28
12" dish	3	1.09	2.18
Regular bowl	27	.37	9.99
K 3715 M—Pattern #10			
6" nappie	6	.31	1.86
7" "	2	.38	.76
Oatmeal dish	1	.20	.20
Coupe soup	68	.21	14.28
Covered dish	2	1.56	3.12
" casserole	2	1.75	3.50
Sauce bowl f. s.	2	1.43	2.86
Sugar bowl	1	1.10	1.10
Creamer	2	.88	1.76
7" Baker	8	.39	3.12
9" "	1	.56	.56
Covered Butter Dish	1	1.22	1.22
Pickle Dish	2	.56	1.12
#K 4502 Pattern #12 (gold band)			
Cups	63	.18	11.34
Saucers	112	.18	20.16
Covered Casserole	4	1.85	7.40
" Dish	7	1.85	12.95
4" Plate	131	.16	24.16
5" "	41	.18	7.38
6" "	196	.21	41.61
7" "	99	.27	26.73
9" "	89	.33	19.47
Sauce Bowl f. s.	10	1.39	13.90
52 Coupe Soups	363	.25	65.75
Oatmeal Dish	97	.24	23.28
Creamer	4	.46	1.48
Sugar Bowl	3	.93	2.79
4" Fruit	56	.12	6.72
5" "	64	.14	8.96
6" Nappie	1	.30	.30
7" "	16	.46	7.36
Heavy Bowl	1	.39	.39
Thin Oyster Bowl	17	.31	5.27
9" Dish	10	.30	3.00
10" "	8	.70	5.60
12" "	3	1.16	3.48

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
#K 4202 Pattern #12 (gold band)—Continued			
7" Baker	11	$0.47	$5.17
8" "	*13	.70	9.10
Bone Dish (CB #4)	6	.25	1.50
Soups " "	124	.29	35.96
Jam Jar	1	1.00	1.00
Bon Bon Dish	1	1.80	1.80
" " "	1	1.42	1.42
" " "	1	.92	.92
" " "	1	2.06	2.06
Dish	2	2.00	4.00
Pickle Dish (#4 CB)	18	.50	9.00
Syrup Set	1	1.25	1.25
Regular Bowl #4 CB	20	.41	8.20
Covered Butter #12	(5	1.39	6.95
Cellars (pairs)	1 pair	.83	.83
" "	1 "	.27	.27
9" Nappie	8	.79	6.32
#67926 Bluebird #2			
Cups	6	.11	.66
Saucers	10	.11	1.10
4" Plates	289	.09	26.01
6" "	1	.13	.13
7" "	*55	.14	8.80
4" Fruits	24	.07	1.68
5" "	155	.08	12.40
Pickle Dish	13	.28	3.64
Sugar Bowl	1	.86	.86
Creamer	1	.38	.38
Oatmeal	1	.16	.16
7" Nappie	17	.28	4.76
8" "	27	.42	9.24
Sauce Bowl f. s.	5	.38	1.90
Regular Bowl	23	.23	5.29
Pitcher	7	.47	3.29
Coupe Soups	33	.18	5.60
53 E—4915 Pattern #3			
Cups	181	.13	23.53
Saucers	61	.13	7.93
4" Plate	52	.11	5.72
5" "	180	.13	23.40
6" "	32	.16	5.12
7" "	227	.20	45.40
Covered Butter Dish	3	1.01	3.03
Sugar Bowl	2	.68	1.36
Creamer	2	.34	.68
Coupe Soup plate	81	.18	14.58
Oyster Bowl	19	.25	4.75
Regular "	19	.36	6.84
7" "	22	.68	14.52
Fruit Dish	1	.09	.09
Oatmeal Dish	1	.16	.16
Covered "	1	1.18	1.18
" Casserole	4	1.35	5.40
Pickle Dish	5	.34	1.70
Gravy f. s.	5	1.01	5.05
8" platter	9	.26	2.32

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
E—4015 Pattern #3—Continued			
10" Platter	7	$0.51	$3.57
12" "	3	.85	2.55
6" Nappie	1	.28	.28
7" "	1	.34	.34
9" "	1	.51	.51
7" Baker	9	.34	3.06
9" "	5	.51	2.55
Radium White #1			
Cups (light)	678	.06	34.24
" (heavy)	106	.08	8.42
Saucers (light)	387	.06	20.06
" (heavy)	15	.08	1.20
Coup Soups	145	.11	15.95
Oatmeal Dishes	7	.10	.70
Soup Plates	1	.11	.11
Oyster Bowl	56	.13	7.28
Large Bowl	6	.14	.84
Pickle Dish	64	.19	12.16
7" Nappie	71	.20	14.20
8" "	1	.30	.30
9" "	1	.40	.40
7" Baker	22	.30	6.60
8" "	5	.30	1.50
4" Fruit	472	.05	23.60
5" "	307	.06	18.42
Pitcher	7	.23	1.61
Sauce Bowl	1	.27	.27
12" Dish	9	.41	3.69
Milk Jugs	3	.23	.69
Sugar Bowl	13	.40	5.20
Creamer	10	.30	3.00
4" Plate	338	.06	20.28
5" "	287	.08	22.96
6" "	98	.09	8.82
7" "	555	.12	66.60
Radium White #1			
Gravy Pitcher	19	.27	5.13
8" Platter	15	.17	2.55
10" "	24	.30	7.20
Crooksville China Company H19			
Cups	279	.08	22.32
Saucers	321	.08	25.68
Sauce Bowl f. s.	8	.60	4.80
Sugar Bowl	11	.60	6.60
Creamer	12	.31	3.72
4" Fruit	106	.05	5.30
Oat	62	.06	3.72
7" Baker	1	.31	.31
8" "	4	.30	1.20
4" Plates	269	.07	17.23
5" "	98	.08	7.60
6" "	142	.09	12.78
7" Plates	62	.12	7.50
Covered Butter Dish	3	.64	1.92

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Crooksville China Company H19—Continued			
7" Nappie	18	$0.21	$3.78
6" "	11	.33	3.63
Coup Soups	25	.11	2.75
51 pc. dinner set	2 sets	2.97 (set)	5.94
Covered Casserole	2	.85	1.70
Pickle Dish	6	.21	1.26
8" Platter	24	.18	4.32
10" "	12	.32	3.84
12" "	11	.50	5.50
Regular Bowl	3	.18	.54
Oatmeal	1	.06	.06
Crooksville China Company H19 Con.			
Soup Bowl	1	.11	.11
Covered Vegetable Dish	1	.85	.85
K 3715M Pattern #10			
Cups	171	.18	30.78
Saucers	158	.18	28.44
4" Plate	61	.13	7.93
5" "	21	.14	2.94
6" "	25	.17	4.75
7" "	47	.22	10.34
8" "	1	.27	.27
9" Dish	2	.31	.62
55 10" dish	2	.56	1.12
12" "	2	.94	1.88
4" Fruits	46	.10	4.60
5" "	83	.11	9.13
Oyster Bowl	13	.27	3.51
Regular "	4	.32	1.28
Hand-painted Japanese Ware			
Cups	260	.17	44.20
Saucers	309	.17	52.53
Plates	19	.75	14.25
"	28	1.17	32.76
"	2	.50	1.00
Plates 6"	49	.40	19.60
" "	7	.25	1.75
" "	15	.40	6.00
" "	5	.53	2.65
Salad Plates	114	.53	60.42
Pitchers	3	2.33	6.99
Dish	11	1.00	11.00
"	6	1.50	9.00
"	3	2.00	6.00
Pitcher (lemon squeezer missing)	1	.46	.46
Cake Plates	8	.67	5.36
4" Fruits	47	.20	9.40
Luncheon Plates	71	.50	35.50
Bowls	19	1.25	23.75
"	16	1.08	17.28
"	13	1.00	13.00
"	13	.83	10.79
"	16	1.33	21.28
"	3	2.00	6.00

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Hand-painted Japanese Ware—Continued			
Dishes	3	$3.58	$10.74
"	1	1.92	1.92
"	2	1.42	2.84
Bavarian #1230			
Cups	1,327	.12	159.24
Saucers	1,309	.12	157.08
Lunch Plates	1,263	.23	290.49
D-2551 Japan			
Cups	328	.15	49.20
Saucers	330	.15	49.50
9" Plates	144	.30	43.20
Bavarian Lunch Set			
Cups	15	.10	1.50
Saucers	16	.10	1.60
56 Plates	18	.19	3.42
Sugar	3	.58	1.74
Creamer	3	.40	1.20
Tea-pot	3	1.32	3.96
Japan Blue Wreath (Cheap Mdse.)			
Cups	35	.09	3.15
Saucers	43	.09	3.87
4" Plates	6	.17	1.02
4" Fruits	6	.17	1.02
Japan (check border)			
Cups	215	.13	27.95
Saucers	255	.13	33.15
German 666			
Cups	142	.10	14.20
Saucers	169	.10	16.90
Violet Design			
Cups	114	.13	14.82
Saucers	226	.13	29.38
Lunch Plates	132	.25	33.00
Japanese Blue Design			
Cups	181	.09	16.29
Saucers	196	.09	17.64
Plates	63	.17	10.71
#4 Gold and White			
Saucers	4	.18	.72
4" Plates	42	.16	6.72
5" "	7	.18	1.26
4" Fruits	29	.12	3.48
5" "	48	.14	6.72

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
661/21			
Cups	180	$0.13	$23.40
Saucers	179	.13	23.27
Sugar	1	.33	.33
Creamer	1	.33	.33
Tea-pot	3	.83	1.66
4100/1320			
Cups	539	.10	53.90
Saucers	569	.10	56.90
97 Haviland			
Plates	3	.83	2.49
Soups	6	.67	4.02
Fruits	4	.75	3.00
Pie Plates	6	.83	3.13
Gold Band Design			
Plates	7	.17	1.19
"	1	.30	.30
"	7	.83	5.81
Bowls	1	.27	.27
"	1	.30	.30
"	2	.75	1.50
Platter	7	.50	3.50
Saucers	5	.12	.60
#15—#36			
Cups	2	.10	.20
Saucers	37	.10	3.70
Chinaware Dept. Con. 11/100/143			
Cups	551	.10	55.10
Saucers	553	.10	55.30
11/100/34			
Cups	342	.10	34.20
Saucers	366	.10	36.60
1042/415			
Cups	1,155	.10	115.50
Saucers	945	.10	94.50
1390/1401			
Cups	411	.10	41.10
Saucers	381	.10	38.10
2/2/72 (Jap)			
Cups	218	.17	37.06
Saucers	224	.17	38.08
#6/204			
Cups and saucers	11	.20	2.20
Cups #143	146	.10	14.60
Saucers #143	4,010	.10	101.00
Cups #11/100/50	1,023	.10	102.30
Saucers #11/100/50	203	.10	20.30
Cups #30	20	.10	2.00
M Saucers #30	6	.10	.60
Cups #204/0410	80	.10	8.00
Saucers #204/0410	101	.10	10.10

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Lustre Ware			
Tea set	1	$16.67	$16.67
Cake plate	1	2.08	2.08
Mayonnaise set	1	2.08	2.08
Bowl	1	2.08	2.08
Cream pitcher	2	1.42	2.84
Dish with handle	1	1.25	1.25
Vase	1	1.25	1.25
Mayonnaise sets	2	2.08	4.16
Cellars (pair)	1 pair	.83	.83
Dish	1	1.25	1.25
Tea pot	1	.25	.25
" "	4	.58	2.32
" "	4	.83	3.32
" "	1	1.42	1.42
" "	2	3.33	6.66
" "	2	3.75	7.50
" "	2	1.08	2.16
" "	1	1.25	1.25
" "	1	1.00	1.00
" "	1	1.17	1.17
" " (Top)	4	.83	3.32
Coffee pot	1	.75	.75
" "	1	.92	.92
" "	1	1.08	1.08
" "	2	1.17	2.34
" "	1	1.25	1.25
" "	1	2.92	2.92
Cups	1	.17	.17
"	10	.10	1.00
"	2	.23	.46
"	1	.17	.17
"	1	.09	.09
" plain white china	168	.08	13.44
" water	6	.53	3.18
Saucers "	8	.27	2.16
" plain white china	220	.08	17.60
"	2	.08	.16
"	10	.07	.70
"	1	.06	.06
Plates—6"	6	2.08	12.48
" Jap lunch	53	.83	43.16
" Cookie	1	1.58	1.58
"	1	2.25	2.25
"	1	2.08	2.08
"	8	.07	1.76
"	5	.53	2.65
" Cake	4	1.42	4.68
50 Jam jar	1	1.25	1.25
" dish	2	2.08	4.16
Sugar pails	3	1.00	3.00
Bon bon dish	2	2.00	4.00
" " "	4	1.50	6.00
" " "	1	1.42	1.42
" " "	1	1.25	1.25
" " "	1	.73	.73
Salt, pepper, mustard set	1	2.08	2.08
Individual salts	6	1.08	6.48
Cellars	1 pr.	.27	.27

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Lustre Ware—Continued			
Mayonnaise set	2	$1.25	$2.50
Sugar	1	.47	.47
"	1	1.05	1.05
" and creamer	1	1.67	1.67
Pickle dish	1	1.25	1.25
" "	1	1.42	1.42
" "	2	1.00	2.00
Relish dish	1	1.42	1.42
Crumb scraper	1	1.08	1.08
Candlesticks	1 pr.	3.08	3.08
Refrigerator dishes	22	.27	5.94
Nut set (1 large, 4 small bowls)	1	2.25	2.25
Tea set	1 set	16.67	16.67
" "	1 "	3.08	3.08
Berry "	1 "	2.33	2.33
Dinner " 42-pc	9 "	5.92	53.28
" " 32-pc	35 "	3.05	261.80
" " 31-pc	14 "	2.97	41.58
Rose tea set (1 cup short)	1 "	2.08	1.99
Tea "	1 "	8.33	8.33
Console "	4 "	2.08	8.32
Bridge "	1 "	.92	.92
" "	1 "	2.17	2.17
Cake "	2 "	3.08	6.16
Sauce "	1 "	3.08	3.08
Tea "	1 "	4.58	4.58
" "	2 "	3.33	6.66
" " (1 set has one cup short)	2 "	3.75	7.34
" "	1 "	6.67	6.67
" " green	1 "	2.08	2.08
Cup and tray sets	12 "	.75	9.00
Dish	1	1.25	1.25
"	1	2.00	2.00
" celery	1	3.67	3.67
" "	1	3.58	3.58
Sauce bowl with only 5 dishes	1	3.08	2.82
Casserole stand and cover	1	3.75	3.75
Custard cups (Wabash Bak.)	8 bbls.		156.00
Gold trimmed bowl	1	4.17	4.17
Fruit bowl	2	1.25	2.50
Sandwich tray	1	1.42	1.42
Fancy dishes	2	1.83	3.66
60 Creamer and sugar	2	2.08	4.16
Cream pitcher	2	.58	1.16
" "	1	.50	.50
Green plates	5	.50	2.50
Sandwich trays	3	1.42	4.26
Fancy dishes	3	.75	2.25
" "	1	.80	.80
" bowls	2	1.00	2.00
Vegetable dish	1	2.50	2.50
Powder puff and hair receiver set	2	.47	.94
Sample sets (1 cup, 1 saucer, 1 plate)	5	.46	2.30
Refill dish	1	.67	.67

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Broken lots			
Cups	3	$0.05	$0.15
Saucers	6	.06	.36
Plates	6	.12	.72
Sugar bowl	1	.40	.40
Cream pitcher	1	.39	.39
Tea pot	1	.65	.65
Sugar bowl	1	.80	.80
Cream pitcher	1	.66	.66
Tea pot	1	1.45	1.45
Cups and saucers	5	.18	.90
Plates	5	.16	.80
Tea pot	1	.77	.77
Sugar bowl	1	.42	.42
Cups and saucers	5	.18	.90
Plates	6	.15	.90
Sugar bowl	1	.42	.42
Cups and saucers	3	.43	1.29
Plates	6	.43	2.58
Creamer	7	1.14	1.14
Tea pot	1	2.89	2.89
Cups and saucers	6	.25	1.50
" " "	1	.25	.25
Plates	6	.25	1.50
"	2	.33	.66
Soups	10	.27	2.70
Fruits	11	.13	1.56
Sugar bowl	2	.63	1.26
Syrup set	1	1.68	1.68
Salad 4"	7	.40	2.80
" 6"	2	.40	.80
238 F			
Cups	777	.10	77.70
Saucers	771	.10	77.10
61 Glassware			
Water Glass	3	.25	1.52
" "	1	.33	.33
" "	1	.83	.83
" "	52	.66	2.86
" "	4	.07	.28
" " cracked	4	.08	.12
" "	1	.13	.13
" "	1	.30	.30
" "	1 set	4.17	4.17
" " crinkle	108	.05	5.40
" " plain	79	.05	3.95
" " grape design	68	.07	4.67
" " ribber	9	.13	1.17
" " daisy design	119	.25	28.75
" " Kleber Kut Krystal	54	.66	2.70
Sherberts green	13	.17	2.66
"	1	.17	.17
"	13	.27	3.51
"	3	.29	.87
"	1	.30	.30
"	1	.34	.34
"	30	.43	12.90

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Glassware—Continued			
Sherbets green	31	$0.39	$12.09
" plain	58	.65	1.80
" bird pattern (high stem)	14	.43½	5.95
" wreath pattern (low stem)	78	.39	30.64
" blue stem	4	.50	2.00
" iridescent	17	.30	4.90
" wreath design	3	.26	.78
" green stem	23	.50	11.50
" umber	22	.17	3.74
Wine	60	.43	25.80
"	16	.27	4.86
"	155	.26	13.30
" plain	6	.10	.60
Tumblers large	5	.12	.60
" medium	6	.12	.72
62 Tumblers small	3	.12	.36
" "	11	.12	1.32
" " plain #17	301	.12	34.12
Goblet	12	.50	6.00
"	8	.34	2.72
"	3	.42	1.26
"	1	.30	.30
"	1	.17	.17
"	1	.25	.25
" iridescent	76	.29	22.04
" amber	19	.17	3.23
" plain	30	.55	1.50
" Fostoria rose	30	.38	11.40
" bird pattern	12	.43½	5.10
" blue stem	6	.50	3.00
" green stem	8	.50	4.00
Champagne saucers-Fostoria rose	7	.58	4.06
Dish	2	1.67	3.34
"	4	.63	2.52
" cake	8	2.25	18.00
" relish	67	1.00	67.00
" " green	3	.67	2.01
" butter	1	2.50	2.50
" celery	4	2.33	9.32
" "	4	1.67	6.68
" jelly	1	2.25	2.25
" gold band	3	2.42	7.26
" black and gold	1	1.25	1.25
" pickle	1	1.83	1.83
" candy	1	2.08	2.08
" "	1	1.25	1.25
" "	1	2.67	2.67
" gravy	1	.13	.13
Sugar and creamer	3	1.75	5.50
" " "	3	.33	2.49
" " "	1	3.67	3.67
" " "	1	3.33	3.33
Sugar pail	5	1.00	5.00
Vase-blue	5	1.88	9.10
"	33	1.00	33.00
"	1	.30	.30
"	9	.75	6.75

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued	1		
Glassware—Continued			
Vases-blue amber	8	$2.08	$16.64
" "	5	1.25	6.25
" flower	2	.67	1.34
"	3	.75	2.25
" black and gold	2	3.33	6.66
Vase black and gold	2	4.17	8.34
" green and gold	2	1.50	3.00
" " " "	1	1.08	1.08
" " " "	2	.83	1.66
83 " o. l	3	.75	2.25
" I. V	3	1.83	5.49
" M. G	6	.50	3.00
" H. N	11	.67	7.37
"	2	2.08	4.16
" flat	4	1.00	4.00
Plates—6" Pat #10	31	.27	8.37
" 6" " #10	9	.17	1.53
" 5" " #10	3	.14	.42
" 7" " # 3	6	.20	1.20
"	11	.50	5.50
" and bowl	1	2.40	2.40
"	2	1.00	2.00
" green	2	.50	1.00
" yellow	1	.25	.25
" glass mirror	2	1.00	2.00
" " "	1	2.00	2.00
"	1	2.90	2.90
"	1	3.33	3.33
"	181	.15	27.15
" rose	60	.15	9.00
" " cake	9	.50	4.50
"	1	.50	.50
" sponge cake	1	.80	.80
Mayonnaise sets	5	1.30	6.50
Salts—individual	8½ doz.	.90	7.65
"	100	1.10	110.00
" and peppers	2 sets	2.90	5.80
" individual	30	.90	27.00
"	9	.75	6.75
"	2	1.00	2.00
"	2	.25	.50
Candleholders	3 pr.	.33	.99
"	2	1.20	2.40
"	1	1.00	1.00
"	2	3.00	6.00
"	1	.80	.80
" blue	1	1.60	1.60
Water bottles	2	1.05	2.10
" "	2	.80	1.60
Vinegar	4	2.75	11.00
"	14	1.30	18.20
"	1	2.45	2.45
Cups and saucers:			
amber	2	.16	.32
rose	60	.15	9.00

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Glassware—Continued			
Mirror	2	$6.25	$12.50
"	1	5.65	5.65
"	20	3.00	60.00
Mirror	2	5.00	10.00
"	2	2.00	4.00
"	17	.90	15.30
"	8	1.50	12.00
64 "	4	1.00	4.00
" white enamel	3	.57	1.71
Teeth pick holders	24	1.20	28.80
" " "	1	.75	.75
" " "	1	.50	.50
" " "	1	.28	.28
Sets—Kiefers Kut:			
" Krystal	24 sets	.75	18.00
" Console	2 sets	2.00	4.00
" "	4 sets	3.00	12.00
" water	6 sets	4.05	24.30
" "	1 set	9.00	9.00
" "	2 sets	10.75	21.50
" "	1 set	4.85	4.85
" "	2 sets	6.50	13.00
" syrup	1 set	2.35	2.35
" 17 pc. rosebridge	6 sets	2.00	12.00
" water set (1 pitcher 6 glasses)	16 sets	1.60	25.60
" water set (glasses only)	2 sets	.80	1.60
" (crinkal)	5 sets	1.60	8.00
" water set	1 set	.75	.75
" " "	1 set	.57	.57
" bowls	1 set	.75	.75
" "	1 set	1.13	1.13
" "	1 set	.65	.65
" "	1 set	.40	.40
" "	1 set	.30	.30
" bridge sherbets	14 sets	2.10	29.40
" " goblet	11 sets	.90	9.90
" water set C. & C.	1 set	4.00	4.00
" ash tray	1 set	2.40	2.40
" " "	1 set	1.95	1.95
" water-amber	1 set	1.60	1.60
Cookie plate glass	1	.50	.50
Bowls—pat #3	1	.40	.40
"	2	.65	1.30
" amber	1	4.10	4.10
" "	2	1.20	2.40
" fruit	3	1.20	3.60
" green and silver	1	1.20	1.20
"	1	1.60	1.60
"	1	2.40	2.40
"	1	2.00	2.00
" fruit	1	1.50	1.50
Bowls	1	3.25	3.25
" C. G.	1	2.40	2.40
" " "	2	3.25	6.50
" candy	1	2.40	2.40
" C. G.	1	5.35	5.35

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Glassware—Continued			
Bowls—Continued.	5	$1.35	$6.75
65 Fruits	20	.40	8.00
Match holders	1	3.95	3.95
Pitcher—water	3	1.30	3.90
" syrup	1	.40	.40
" "	1	1.10	1.10
" with glass inset	1	.90	.90
" water	1	1.10	1.10
Basket-gold glass	1	.90	.90
"	2	.65	1.30
"	1	2.60	2.60
Compotes	6	1.85	11.10
"	4	2.40	9.60
"	4	2.26	9.00
"	1	1.80	1.80
"	5	2.45	12.25
Platters 12"	5	1.85	9.25
" 10"	1	10.50	10.50
"	1	2.40	2.40
"	1	1.60	1.60
"	8	3.25	25.60
" 14"	1	1.10	1.10
Frame	3	2.25	6.75
Salad dressing bowl	1	1.95	1.95
Candy jar	1	1.85	1.85
" "	1	2.40	2.40
" "	2	1.60	3.20
Mustard	1	.80	.80
"	5	3.65	18.25
Casserole	39	3.15	122.85
" #1801	23	3.65	83.95
" #1803 oval	1	3.25	3.25
"	1	2.60	2.60
" and stand (overman)	1	3.65	3.65
" oval	105	3.75	393.75
" (1254) (stand only)	1	1.15	1.15
Cake cover	1	.80	.80
Nappies	4	1.20	4.80
"	3	1.25	1.25
"	1	1.45	1.45
Perfume bottle	1	1.60	1.60
" "	1	1.80	1.80
" "	1	1.30	1.30
" "	15	1.00	15.00
Tube cake pans #562	8	.50	4.00
Loaf-glass bake	2	3.25	6.50
Glass set trays	1	.75	.75
Syrup jug ½	1	1.25	1.25
" "	3	4.00	12.00
60 Water pitcher	10	.09	.90
Creamer-rose	44	.40	17.60
"	10	.09	.90
Sugar-rose	52	.40	20.80
"	60	.10	6.00
Plates rose			

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Patrician			
Knives and forks	2	$12.00	$24.00
Table spoons	18	.75	13.50
Olive spoons	3	1.09	3.27
Butter knife	1	.75	.75
Berry spoon	1	1.80	1.80
Jelly servers	4	.94	3.76
Sugar spoons	4	.75	3.00
Cream ladle	1	1.35	1.35
Cold meat fork	1	1.50	1.50
Dessert spoons	6	.75	4.50
Tea spoons	6	.38	2.28
13 pc. sets	2 sets	12.00	24.00
42 pc. dinner set	1	5.92	5.92
Sets	2	11.63	23.26
Grosvenor			
Set of 6 knives and forks	1	9.83	9.83
Dinner knives	1 set	12.00	12.00
Tablespoons	12	.75	9.00
Tomato server	1	2.10	2.10
Berry spoons	3	1.80	5.40
Butter knife	3	.75	2.25
Table spoons	6	.75	4.50
Dessert spoons	6	.75	4.50
Pickle forks	3	.90	2.70
Round server	1	2.10	2.10
Teaspoons	18	.38	6.84
Olive spoon	1	1.09	1.09
Gravy ladles	2	1.80	3.60
Individual butter spreaders	12	.65	7.80
Salad forks	6	.73	4.38
Dinner forks and knives, set of 6	1	12.00	12.00
Cream ladle	1	1.35	1.35
Adam			
Set of 6 knives and forks	1	12.00	12.00
Salad forks	6	.73	4.38
47 Fruit knives	6	.77	4.62
Butter spreaders	6	.65	3.90
Dessert spoons	24	.75	14.00
Teaspoons	6	.38	2.28
Round server	1	2.10	2.10
Cake server	1	1.80	1.80
Olive spoon	1	1.09	1.09
Berry spoon	1	1.80	1.80
Bird of Paradise			
Tablespoons	6	.75	4.50
Dessert spoons	6	.75	4.50
Teaspoons Com	24	.38	9.12
" Roger Sov	42	.20	8.40
" Roger Hen	42	.13	5.46
" Roger Hen	15	.13	1.95
" 6 in box	74 boxes	.27	19.98
" 6 in box	1 set	1.07	1.07

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Bird of Paradise—Continued			
Tablespoons Com	6	$0.75	$4.50
" "	12	.75	9.00
" Ardsley	6	.33	1.98
" Sov. Rog	24	.40	9.60
" Cor	96	.27	25.92
Serving spoon	1	.70	.70
Tablespoons Sov	6	.40	2.40
" Cor. Dessert spoons	6	.27	1.62
"	4	.27	1.08
Knives and forks:			
" Com	5 sets	12.00	60.00
" Rog	2 sets	4.33	8.66
"	4 sets	7.90	31.60
"	8 sets	6.85	54.80
"	6 sets	3.53	21.18
" Ardsley	1 set	3.75	3.75
Butter knife sets:			
" Com	2 sets	4.17	8.34
" Ardsley	1 only	.47	.47
" "	12 sets	1.83	21.96
" "	4 sets	.33	1.32
" "	4 only	.83	3.32
" "	9 sets	3.58	32.22
" Individual	1 set	1.83	1.83
Cold meat fork	11	1.42	15.62
	2	1.58	3.16
	1	1.20	1.20
	1	3.25	3.25
	2	.67	1.34
Carving knives	27	.75	20.25
" set	1 set	5.97	5.97
Sugar shell	7 only	.83	5.81
	2	.33	.66
	1	1.25	1.25
68	3	.92	2.76
	3	.75	2.25
	1	.33	.33
Pickle fork	3	.92	2.76
" "	2	.50	1.00
Gravy ladle	3	1.25	3.75
	1	1.33	1.33
	6	.75	4.50
	1	1.58	1.58
Tomato server	3	1.87	5.61
	2	1.00	2.00
	3	.97	2.91
Berry spoon	5	2.00	10.00
" "	4	.75	3.00
Fruit knife sets	24	.75	18.00
Household set	1	2.50	2.50
Baby cups	4	.83	3.32
Baby spoon	1	.30	.30
Baby set	1	.75	.75
Trays	10	1.08	10.80
Crumb scrapers	10	1.08	10.80
" "	1	.92	.92
Sets-Ardsley	32	4.22	135.04

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Bird of Paradise—Continued			
Sets-salesmen's samples (Ardsley)	22	$4.22	$92.84
Sets (Ardsley) Short 8 knives	1	4.22	4.22
" " " 6 forks	1	4.22	4.22
Sets (Ardsley) Short teaspoons, knives, and forks	34	.41	13.94
Salts and peppers	52	.10	5.20
" " " (Obsolete)	4	1.30	5.20
Salts and peppers	34	2.92	70.08
" " "	201	.13	26.13
Tea balls	40 sets	.27	10.80
Soup spoons, set of 3	1 set	5.00	5.00
Set (incomplete) Dessert spoon (6)	12 only	.40	4.80
Sav. Rog	126 only	.27	34.02
(6) Cor. Rog	126 only	.27	34.02
(6) " "	5 only	.27	1.35
	3 only	.13	.39
	1 set	2.06	2.06
Salad fork, Rog	30 only	.39	11.70
Sav	12 only	.73	8.76
Com	6 only	.36	2.16
Rog. Cor	6 only	.36	2.16
"	5 only	.94	4.70
Jelly server	1 only	.50	.50
60 Picture frame	75 sets	.58	43.50
Knife sets	8 "	.67	5.36
Butter and sugar	1 set	.75	.75
	2	.97	1.94
Cucumber server	4	1.83	7.32
Pie server	3	.50	1.50
Pickle fork	1 set	2.50	2.50
Cutlery set (2 knives missing)	4	1.09	4.36
Olive spoon Com	1 set	4.15	4.15
Bouillon spoon	6 only	.38	2.28
Coffee spoons Com	1 set	1.65	1.65
Oyster spoons	1 "	1.50	1.50
Orange spoon	1 only	1.83	1.83
Cake knife	3 sets	.67	2.01
Child's knife, fork, and spoon	9 sets	.75	6.75
Child's sets	75	2.25	168.75
Pearl strings			
Kitchen-Ware			
Kettle	2	1.66	3.16
"	1	1.33	1.33
"	2	1.00	2.00
" tea	1	2.50	2.50
" "	1	1.25	1.25
" "	1	3.33	3.33
" "	1	3.42	3.42
" "	1	2.50	2.50
" "	1	1.67	1.67
" Cast iron	1	2.33	2.33
" blue granite	1	1.50	1.50
" gray (without covers)	144	.22	31.68
" enameled tea 5 qt	1	1.67	1.67
" granite with cover 8 qt	1	1.42	1.42

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Kitchen-Ware—Continued			
Kettle Windsor with cover 6 qt	300		$700.00
" (4 qt. bak. powder)	55	80.23	13.20
" wh. granite preserving (no cover)	125	.39	51.97
" granite 10 qt.	2	.39	.78
" Berlin wh. granite #0121	11	1.80	19.80
" Water wh. enamel #680	5	2.14	10.70
" " " " #676-60z	8	1.50	12.00
" Berlin 10 qt. #6361 wh. enamel green label	2	1.54	3.08
Kettle Berlin 8 qt. white enamel green label	2	1.40	2.80
20 Kettle Berlin 8 qt. Savory ware	6	1.40	8.40
" Berlin 6 qt. Savory ware	9	1.14	10.26
" Berlin 4 qt. Savory ware	8	.88	7.04
" "	1	.75	.75
" "	2	1.25	2.50
Kettles—granite 4 qt	1	.88	.88
"	1	1.80	1.80
"	1	1.83	1.83
Sauce pan—qt.—2	1	1.00	1.00
" "	2	.82	1.64
" " granite blue	3	.27	.81
" " Lifetime sets #242	83	2.68	222.44
" " do (used)	1	2.68	2.68
" " Triple set	1	5.52	5.52
" " " "	6	5.52	33.12
" " steel enamel (Ranton)	1,632	.11	179.52
" " wh. en. #8	1	.11	.11
Roaster—granite	2	1.67	3.34
" "	1	2.08	2.08
" "	27	.35	9.45
" blue enamel #106	324	.35	113.40
" Savory—large	13	2.67	34.71
" Royal blue	10	1.08	10.80
" meat	1	1.08	1.08
Toaster elec	101	2.97	299.97
"	19	2.97	56.43
"	3	1.88	5.64
"	7	.70	4.90
Bread box	6	1.80	8.00
" "	4	2.20	8.80
" "	2	3.27	6.54
" " #1	19	1.50	28.50
" " #2	31	2.20	68.20
" " #3	4	3.27	13.08
Pans—dish	1	.27	.27
" " oval	1	.67	.67
" "	1	.92	.92
" "	1	1.00	1.00
" "	1	1.08	1.08
" " 10 qt	795	.20	159.00
" " 14 " wh. en	7	1.14	7.98
" " " " gr	2	1.14	2.28
" " 17 " wh. en	5	1.30	6.50
" " 17 " gr	1	1.30	1.30
Pie dish	2	.17	.34
Pudding	5	.36	1.80
"	5	.90	1.80
"	8	.30	2.40

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Kitchen-Ware—Continued			
Broiling	1	$1.00	$1.00
	2	.25	.50
	4	.65	2.60
71 Sponge-cake	2	.62	1.24
" "	2	.73	1.46
Cake	2	.49	.98
"	1	.33	.33
Stew (prunes)	59	.11	6.49
bl. gr.	39	.20	7.80
Custard (pans)	12	.23	2.76
Frying (bak. pdr.)	1	.20	.20
Coffee Mill	2	.90	1.80
" " lap	6	.82	4.92
" " crystal	17	.90	15.30
Mixing bowl—bl. gr. #20	553	.15	84.45
" " " gr. #24	484	.17	82.28
" " " gr. #28	552	.21	115.92
" " earthen ware	9	.30	2.70
" " " "	15	.42	6.30
" " " "	27	.67	18.09
" " " "	5	1.17	5.85
" " nuts	6	.75	4.50
" " al	220	.16	62.24
" " (bak. pdr.)	2	.21	.42
Coffee Pot—Old English	2	.87	1.74
" " Savory 1 qt	5	.86	4.30
" " " 1½ qt	4	.92	3.68
" " " 2 "	9	1.14	10.26
" " " 3 " #2351	19	1.24	23.56
" " " gr. label 1 qt	2	.86	1.72
" " " 1½ qt	1	.92	.92
" " " 2 qt	5	1	5.30
" " inset	1	1	.15
Cake covers	37	1	32.95
" Stand	1	1.25	1.25
Tea fruit dishes	6	.15	1.92
Strainers (with TruJells)	360	.10	36.00
sink	1	1.35	1.35
Bread raiser	1	1.39	1.39
" "	1	1.73	1.73
" Mixer	1	2.05	2.05
" "	1	2.70	2.70
Percolator—elec	25	5.45	136.25
" "	4	5.45	21.80
" " damaged	1	4.50	4.50
" "	1	2.80	2.80
" "	2	1.75	3.50
" "	5	1.15	5.75
" "	1	.92	.92
" "	1	.90	.90
" "	2	.75	1.50
" "	1	.70	.70
" "	3	.58	1.74
" insets	36	.18	6.48
" handles	38	.13	4.88
72 " " small	9	.13	1.08
" top	59	.02	1.18
Paring knives	1000	.04½	45.00
" " —acme #138 spl	284	.04½	11.88

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Kitchen-Ware—Continued			
Pail—gr. water	1	$1.50	$1.50
" "	1	1.13	1.13
" "	2	1.08	2.16
" " 14 qt. wh. en	3	1.50	4.50
" " 12 qt. wh. en	7	1.30	9.10
Flour bins	1	1.13	1.13
7 pc. Kitchen spice set	1	.65	.65
3 pc. carving set	1	1.50	1.50
Pie frames	17	2.00	34.00
Household sets	65	2.50	162.50
Food chopper	1	1.14	1.14
" "	3	1.41	4.23
" "	1	1.97	1.97
" " #20	16	1.14	18.24
" " #30	50	1.41	70.50
" " #40	22	1.97	41.14
Knife sharpener 2nd hand	1	.70	.70
Sugar cans	5	.55	2.75
Can openers Bunker Clancy	170	.29	49.30
Wash basin	2	.50	1.00
" "	1	1.00	1.00
" " wh. gr.	5	.50	2.50
" " tub galv. #330	20	1.16	23.20
" " "	2	1.16	2.32
Boilers #4859	7	3.62	25.34
Wash boilers #2239	2	2.37	4.74
" " TP 359	2	4.62	9.24
Drain boards	4	.60	2.40
Tea kettles—colonial #106	6	3.06	18.36
Drip pan—bl. gr.	1	.23	.23
Scales—#3000 C	22	1.00	22.00
Sanitary sink baskets	51	1.35	68.85
Kitchen knife set	1	.58	.58
French fryers	157	.80	125.60
Pitcher—gr.	1	1.00	1.00
Dipper	7	.30	2.10
Egg beater	1	.30	.30
" Poacher	1	1.25	1.25
Popcorn popper	42	.75	31.50
Lunch kit	1	1.71	1.71
" boxes	2	1.90	3.80
Pancake griddle	1	1.50	1.50
Butter churn	1	1.25	1.25
" "	2	.75	1.50
" "	1	5.65	5.65
Egg beater—sunlite	22	.63	31.87
Stainless steel sets	1	.75	1.00
Potato pot	1	1.80	1.80
" ricer	11	.25	2.75
73 Soup boiler #2341	1	2.25	2.25
" " #0141	1	1.50	1.50
Rice boiler	1	1.19	1.19
" "	1	1.34	1.34
" " wh. gr. #541	8	1.70	13.60
" " " " #631	4	1.40	5.60
" " gray gr. "	9	1.40	12.60
Bowl sets (3 to set)	2	.40	.80

Articles of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Kitchen-Ware—Continued			
Waffle iron	7	$8.00	$16.90
" "	9	5.00	45.00
" " elec	12	4.00	48.00
" "	1	3.00	3.00
Toasters	33	1.87½	61.88
" gas	3	1.45	4.35
" stove	4	1.25	5.00
Ice cream freezer 1 gal	1	3.40	3.40
Small skillet (bak. pdr.)	452	.20	90.40
Glass butter jars "	12	.20	2.40
Console set	1	3.00	3.00
Thermos 1 pt	3	1.10	3.30
" 1 qt	4	1.51	6.04
" 1 gal	2	1.50	3.00
" jug	1	1.50	1.50
" top	11	.35	3.85
" "	1	.35	.35
Vacuum bottles 1 pt. #21	31	1.10	34.10
Vacuum bottles 1 qt. #32	2	1.51	3.02
" " fillers 1 pt	71	.65	46.15
" " 1 qt	3	1.06	3.18
Ley. hot fillers #65 qt. filler	8	1.00	8.00
" " " bottle #28 pt. bottle	17	1.10	18.70
" " " #25 pt. filler	21	.65	13.65
Alladdin Thumalware jar	47	1.50	70.50
Shino cloths	229	.26	59.54
Silver cleanser elec	94	.24	22.56
Wash boiler	2	2.37	4.74
Waterless cookers			
American	123	2.00	244.00
" (used)	1	1.00	1.00
" (demon)	11	1.00	11.00
"	58	2.45	142.10
"	30	2.45	73.50
" (used)	1	1.22	1.22
" (demo)	1	1.22	1.22
" (incomplete)	1	1.22	1.22
"	1	4.00	4.00
" Insets	9	.62	5.58
Insets	1	.28	.28
" Bases	21	.40	8.40
"	136	.62	84.32
Bases	6	.40	2.40
Kettle-tea-with inset 6¼ qt	23	2.27	52.21
" "	1	1.25	1.25
74 " " cast alum. 9 qt	1	3.42	3.42
" #133-12 qt	6	1.74	10.44
" #130-10 "	13	1.56	20.28
" #129- 8 "	13	1.35	17.55
" #126- 6 "	6	1.14	6.84
" #124- 4 "	12	.96	11.52
"	2	1.50	3.00
"	4	1.06	4.22
" #9006	5	.83	4.15
" #244	3	1.08	3.24
"	30	.18	5.40

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Waterless cooker—Continued			
Percolator—3 qt	20	$1.48	$23.84
" spun 2 qt	11	2.50	12.50
Roaster #43 qt	13	1.50	19.00
" (old style)	13	2.33	30.29
" baby bell	211	2.10	122.70
" square 2	2	1.08	2.16
" "	1	1.08	1.08
"	1	4.17	
Percopot	13	1.67	21.71
Coffee pot 1 qt	7	1.08	7.56
" 2 qt. Wagner	1	2.92	2.92
Tea pot #752-2 qt	20	1.25	25.00
" " #762-2 qt	1	1.08	1.08
" " #761-1 qt	4	.94	3.76
De Luxe set—3 pc	50	4.25	212.50
Sets—cast alum	1	4.25	4.25
" water (Sunlite)	11	2.08	22.88
"	1	5.50	5.50
Sauce pan	1	2.52	2.92
" child's pots and pans	1	.83	.83
" berry (Kettle, cover and ladle strainer)	27	1.75	47.25
Double boilers—3 qt. #1084	12	1.34	16.08
" " 2 qt. #1082	25	1.19	29.75
Pudding pans—large	13	.49	6.37
" " medium	20	.32	6.40
" " small	1	.30	.30
Pan—save all pie	3	.05	.15
" pie	7	.05	.35
"	1	.50	.50
"	1	.58	.58
" stew, with covers—(Vanilla)	20	.18	3.60
" jelly	11	.33	3.63
" loaf	6	.36	2.16
" utility	11	.96	10.56
" sponge cake (large)	25	.73	18.25
" sponge cake (small)	37	.62	22.94
" cast alum. fry (Lifetime) #804	8	1.48	11.84
" Wagner	23	1.67	38.41
75 " "	4	1.50	6.00
" dish—17 qt. #317	9	1.78	15.94
" #314	7	1.59	11.13
"	1	2.00	2.00
Pail #113-12 qt	2	1.03	2.06
"	1	1.08	1.08
Bread raiser #321	9	1.73	15.84
" " #317	14	1.30	20.86
" " #314	7	1.25	8.75
" mixer	7	2.70	18.90
Rice boiler	1	1.17	1.17
" "	1	1.80	1.80
Egg Poacher	5	1.38	6.25
Dutch oven	1	1.67	1.67

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Lunch Sets			
Linen	6	$3.62	$21.72
"	4	7.00	28.00
"	1	13.25	13.25
"	2	3.75	7.50
" 50"	16	2.95	47.20
" 66 x 66	10	5.25	52.50
"	147	2.00	29.400
Lunch Cloths			
Linen	137	3.75	513.75
"	2	6.75	13.50
"	93	2.25	209.25
"	85	.96	81.60
Table Cloths			
Fairy damask 54 x 57	24	1.55	37.20
" " "	378	1.55	585.90
" "	199	1.85	368.15
Bridge Sets 36"	7	2.00	14.00
Blue border—full size	1	3.75	3.75
White 68 x 68	1	2.00	2.00
" 72 x 72	3	6.75	20.25
" 64 x 71	1	2.00	2.00
" 70 x 90	1	3.75	3.75
" 63 x 63	2	2.25	4.50
Bed Spreads			
Rayon #55502	7	12.00	84.00
" #55475	9	8.00	72.00
" #55340	14	7.00	98.00
" #4200—Betsy Ross	5	4.50	22.50
" #55503	51	4.00	204.00
" 08	11	3.70	40.70
" #86 x 106 ster	42	3.70	155.40
Jacquard woven #906	26	2.85	74.10
72 Satin	4	11.00	44.00
Silk rep	5	14.00	70.00
Blue	10	2.85	28.50
Rose	6	2.85	17.10
Ivory	1	14.00	14.00
Orchid	2	2.85	5.70
Pink	2	3.70	7.40
White	6	3.00	18.00
Bed Spreads			
White	1	3.70	3.70
Crinkel	7	2.65	18.55
"	1	2.30	2.30
"	43	1.45	62.35
Gold	8	2.85	22.80
Cannon bed set	1	2.30	2.30
" 80 x 90	87	2.30	200.10
Cinderella 84 x 106	13	2.85	37.05
Fancy quilt	13	2.98	38.35
"	2	2.85	5.90
" demon	1	2.00	2.00
" demon	1	1.00	1.00

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Blankets			
Kenilworth 70 x 80	168	$3.80	$638.40
Nabob 68 x 80	110	3.45	379.50
" 66 x 80	11	3.45	37.95
Normon 70 x 80	36	3.05	109.80
Holland 66 x 84	22	11.50	253.00
Hi-art 68 x 80	115	2.60	299.00
" " 68 x 80	62	2.60	161.20
Bonett (all wool)	6	7.50	45.00
Highland 70 x 80 #6973	7	7.50	52.50
Stuart 70 x 80	3	7.50	22.50
Sentinel 66 x 80	5	6.05	30.25
Nabob	4	3.45	13.80
Primus	3	6.05	18.15
Blue	1	11.50	11.50
Rose	1	11.50	11.50
Gold wool	2	6.05	12.10
#4672 72 x 84	48	10.00	480.00
#4672 72 x 84	5	10.00	50.00
Shipment from G. F. Hellick Coffee Company	5 cases	-------	800.00
Comforters	2	10.50	21.00
Auto robes	25	3.50	87.50
Covers			
Tapestry	3	1.75	5.25
"	11	2.50	27.50
"	6	5.00	30.00
"	2	5.25	10.50
77 "	4	3.50	14.00
"	1	.45	.45
Runners			
Velvet	1	.84	.84
"	4	1.50	6.00
Velour	2	2.00	4.00
"	2	2.17	4.34
Tapestry	1	3.35	3.35
"	15	2.50	37.50
"	1	1.75	1.75
"	1	.75	.75
Curtains			
Lace panel	43	2.57½ pr.	110.73
" pr	1 pr.	1.57	1.57
" panel	35	2.65	92.75
" panel	14	2.10	29.40
" "	1	5.50	5.50
" "	1	2.60	2.60
" "	19	1.75	33.25
" "	12	.75	9.00
" pr	2 pr.	1.75	3.50
Voile pr	63 pr.	1.75	110.25
" pr	13 pr.	1.65	21.45
" pr	11 pr.	1.85	20.35
Marquisette-dotted pr	23 pr.	1.25	28.75
" -French	28	2.60	72.80
Marquisette-striped	6	1.90	11.40
" pr	12 pr.	2.50	30.00
Casement cloth ruffled pr	6 pr.	1.65	9.90
Draperies pr	10 pr.	1.40	14.00

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Curtains—Continued			
Panels	27	$0.42	$11.34
"	15	1.83	27.45
"	33	.32	27.39
Velour drapes	4 sets	3.33	13.32
Pillow Cases			
Truth 45"	13	.26	3.38
" 42"	160	.24	38.40
Pacific 42"	24	.37	8.88
" 45"	17	.39	6.63
" 42"	13	.37	4.81
Sheets			
Truth 72 x 90	24	.88	21.12
" 81 x 99	66	1.05	69.30
Sheets			
Truth 72 x 99	43	.97	41.71
Pacific 81 x 99	57	1.45	82.65
78 " 81 x 90	91	1.34	121.94
" 72 x 99	66	1.34	88.44
Towels			
Face	53	.36	19.08
"	25	.58	14.50
" #885	34 doz.	2.25	76.50
"	110¾ doz.	2.25	249.00
Bath towel sets	1	1.00	1.00
Misc.			
Silk pillow	1	1.45	1.45
Handkerchiefs (fancy)	2	.37½	.75
" (ladies) #1353	1286 boxes	.49 each	630.14
" ladies #145	62 doz.	6.00 doz.	372.00
" men's	1003 boxes	.66 box	722.94
Cretonne	20 yd.	.53 yd.	10.60
Mattress protector	1	1.96 each	1.96
Pillow covers	9	1.17 each	10.53
Cushions	3	1.45 each	4.35
Round chenile pillow covers	9	3.00 each	27.00
Women's Bloomers			
No. 1903	741	.53	466.83
" 4613	172	1.22	209.84
" 5277	91	2.00	182.00
Stockings			
Silk	140	1.34	187.60
"	792	.63	498.96
Rugs			
Rag	3	.50	1.50
" 27 x 54 Hopkins	2	.62½	1.25
" " "	177	.62½	110.63
"	1	10.00	10.00
"	1	13.00	13.00
"	9	4.15	37.35
" 27 x 54-Ax-Rax	5	3.25	16.25

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Rugs—Continued			
Oriental franco	4	$14.80	$59.20
" "	5	5.25	26.25
" "	11	5.25	57.75
" "	9	14.80	133.20
36 x 70-Ax-Rax	2	5.60	11.20
30 x 60-Chen-National	2	2.56	5.12
Chenille " "	29	2.56	74.24
" " " 27 x 54	69	2.00	138.00
" -Ax-Rax	13	5.50	71.50
" 27 x 54 Chen-Nat	1	2.88	2.88
Cocoanut Mats-Marsh	6	1.45	8.70
Wilton Leedorn	3	5.50	16.50
70 Camelshair Rox	4	.87	3.48
Latonia Wilton Leedorn	2	10.15	20.30
Roxbury 36 x 70	4	5.60	22.40
Axminster "	2	5.50	11.00
President Wilton velvet	3	4.40	13.20
Velvet step rugs National	19	2.67	50.73
Velvet step rugs National	12	2.10	25.20
Oval rugs National	4	1.85	7.40
Rubber door mats	13	2.10	27.30
Linoleum			
6 x 9	40	5.05	202.00
9 x 10½	52	9.25	481.00
9 x 12	43	10.58	454.94
7½ x 9	33	6.29	207.57
Oilcloth 3 yd. runner	16	2.20	35.20
" 65 x	35	1.00	35.00
" card table covers 35 x	2	.47	.94
Lamps			
Complete	4	26.00	104.00
"	1	28.00	28.00
"	1	18.75	18.75
"	4	21.00	84.00
"	1	11.75	11.75
"	1	13.50	13.50
"	3	12.00	36.00
"	11	10.25	113.75
"	1	10.00	10.00
"	6	8.75	52.50
"	2	8.50	17.00
"	1	6.75	6.75
" large	1	30.00	30.00
"	10	11.50	115.00
"	1	7.00	7.00
"	1	8.50	8.50
"	4	2.60	10.40
"	3	1.20	3.60
" reading	1	1.00	1.00
shade	1	1.20	1.20
" obsolete	40		
stands only	4	6.00	24.00
" "	2	8.75	17.50
" "	1	3.00	3.00
" "	5	3.33	16.65
" "	2	1.25	2.50
" "	6	2.50	15.00
" "	2	5.50	11.00

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued	-		
Lamps—Continued			
Junior lamp	1	$10.25	$10.25
" "	1	26.00	26.00
" "	1	13.75	13.75
" "	1	16.50	16.50
80 " "	1	22.50	22.50
" "	1	8.25	8.25
" " stand only	1	6.00	6.00
Bridge shade	1	5.00	5.00
Bedroom lamp	39	1.47	57.33
" "	2	1.67	3.34
Gooseneck "	12	1.75	21.00
Stands only	2	2.00	4.00
Complete 1 without shade	14	1.67	22.58
"	3	13.75	41.25
"	2	3.33	6.66
"	2	1.00	2.00
"	2	2.50	5.00
" large	1	13.75	13.75
Complete	5	2.60	13.00
Shades	1	2.70	2.70
"	1	5.63	5.63
"	1	6.67	6.67
"	1	6.55	6.55
"	10	1.67	16.70
Stands	3	3.33	9.99
"	18	3.25	58.50
"	15	6.00	90.00
Table lamps	4	13.75	55.00
"	2	3.33	6.66
Lamp cords	4	1.00	4.00
" "	4	.25	1.00
Clocks			
Lewen	42	5.20	218.40
Tick Tock	12	1.62	19.44
Magnor	3	5.20	15.60
Dutch	6	1.75	10.50
#7000-30	48	1.50	72.00
#431-100	7	3.50	24.50
Orsen	1	1.62	1.62
Clock	4	5.20	20.80
Kitchen—8-day plate	16	1.75	28.00
Kitchen—8-day plate	1	1.75	1.75
Kitchen—8-day plate	2	3.00	6.00
Furniture			
Chairs—leather dining room	2	2.75	5.50
Rockers—#5573/4	5	4.50	22.50
" —Child's	4	3.25	13.00
" —No. R5026/41403 (child's)	6	3.25	19.50
" —No. R 5026/43693 child's	10	3.25	32.50
Stool	1	1.65	1.65
"	1	1.65	1.65
" kitchen	8	1.00	8.00
" bath	1	.65	.65
21 Shoeshine outfit	1	6.50	6.50
Leatherette pillows (Thomas Co.)	13	.45	5.85
Card table	11	1.81	19.91
" " Covers (Thompson Auto top)	227	.47	106.69

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Pyrex			
Pie plate and stand	7	$3.33	$23.31
" " " "	1	2.63	2.63
" " " "	1	1.50	1.50
" " " "	3	.43	1.29
Casserole	1	1.23	1.23
"	1	1.50	1.50
" and stand	1	3.35	3.35
Utility pan	1	1.17	1.17
" "	2	.67	1.34
" " #232	1	1.17	1.17
" " #231	3	.67	2.01
Loaf	2	.60	1.20
Dishes	5	.48	2.40
"	6	.37	2.22
" cake #221	8	.50	4.00
" "	1	.50	.50
Bowl	1	.90	.90
"	1	1.08	1.08
"	2	1.33	2.66
"	5	.30	1.50
Custards #426	14	.17	2.38
Sponge cake	1	1.00	1.00
Bran jar	1	1.67	1.67
" " #506	7	1.67	11.69
Tea pot	2	3.75	7.50
" "	2	3.33	6.66
Fry Glass			
Utility tray #1942	2	.58	1.16
" " #1932	1	.90	.90
Pie plate	1	.42	.42
Toilet Sets			
Powder puff holder	3	1.70	5.10
" " "	3	1.75	5.25
Pin cushion	1	1.70	1.70
Hair receiver	1	1.70	1.70
" "	1	1.75	1.75
82 Jewel tray	1	3.15	3.15
Nail buffers	2	1.80	3.60
" powder holders	1 set	1.10 set	1.10
Button hook	2	.50	1.00
" "	1	.45	.45
Cuticle knives	2	.50	1.00
Tray—ivory	1	1.75	1.75
"	1	3.15	3.15
Brush	1	2.35	2.35
Dresser set	4 sets	3.59 set	14.36
Shaving set	1	2.00	2.00
Combs	5	.80	4.00
"	1	.45	.45
Perfume bottle and holder	2	1.50	3.00
Talcum powder	1	1.00	1.00
Hair brush	2	3.10	6.20
" "	1	2.75	2.75
Mirror, comb and brush sets	15	3.59 set	53.85
Toothbrush sterilizer	51	.35	17.85
" " holders	5	.35	1.75
Hair brushes	2	7.25	14.50

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Toilet sets—Continued			
Comb	1	$0.80	$0.80
Cuticle cutters	4	.12	.48
Button hooks	3	.50	1.50
Shoe horn	1	.12	.12
Ivory tray	1	1.75	1.75
Hall polish holders	1	.80	.80
" " "	1	.12	.12
" buffer	1	1.00	1.00
" file	1	.50	.50
Curling irons	5	.90	4.50
"	1	.90	.90
" " electric	1	.90	.90
Toilet sets	32	.98	31.36
Smoking Articles			
Smoking stand #63-55 375x	17	5.50	93.50
" " #63-89 300x	4	4.75	19.00
" " Burke Clancy 200x	9	3.10	27.90
" " 780x	2	12.50	25.00
" " 510x	1	8.50	8.50
" " 375x	1	5.50	5.50
" set 40x	7	.65	4.55
" " 150x	14	2.50	35.00
Capital cigar lighter 130x	17	2.00	34.00
Ash try and " 165x	6	2.50	15.00
Cigar lighter 175x	1	2.50	2.50
Flints 3x	98 pkgs.	.05 pkg.	4.90
Bird Cages			
With stand 500x	2	8.00	16.00
" " 405x	2	6.54	13.08
83 " " 400x	4	6.00	24.00
" " 390x	1	6.25	6.25
Stands only (F & H Mfg. Co.) #105	4	1.50	6.00
Umbrella—ladies 175x	10	2.87½	28.75
" " 225x	122	3.50	427.00
" " 125x	165	1.75	288.75
" men's 125x	17	1.75	29.75
Pencils			
" $0.75	18	.40	7.20
" 1.50	8	.80	6.40
" 2.00	2	1.00	2.00
" 1.00	8	.50	4.00
" 2.75	3	1.50	4.50
" .25	7	.13	.91
" 3.00	2	1.50	3.00
" .50	1	.25	.25
" tins, erasers, and leads	30	.05	1.00
" Redipoint	120	.40	48.00
" " (tarnished)	22	.50	11.00
" Swanberg's	18	.10	1.80
" Tubits	69	.10	6.90
Dolls and Carriages			
Doll heads	2	1.25	2.50
" "	5	1.00	5.00
" "	3	1.75	5.25
" "	2	2.50	5.00
" Suds Smiles	7	2.00	14.00

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Dolls and carriages—Continued			
Doll Sunny Girl	3	$3.00	$9.00
" " "	102	3.50	357.00
" " Boy	2	4.00	8.00
" Vanita	1	2.25	2.25
"	1	3.25	3.25
"	1	1.25	1.25
"	2	3.50	7.00
" Sunny Girl #154	40	3.00	120.00
" Soosie Smiles #4713	65	2.00	130.00
" B 550x (1p1)	15	2.50	37.50
" Equ #4539	24	2.95	70.80
" Lloyd, doll #7018	1	6.75	6.75
Doll carriages	1	2.50	2.50
" "	1	2.75	2.75
" "	6	3.25	19.50
" "	1	4.50	4.50
" "	5	5.00	25.00
" "	3	5.50	16.50
" " #6025	4	4.50	18.00
" " #7016	2	5.00	10.00
" " #6039	4	5.50	22.00
84 Children's Department			
Coaster—Zenith	3	5.60	16.80
" "	3	6.00	18.00
Wagons	1	3.00	3.00
"	3	5.60	16.80
"	1	6.00	6.00
" Skeesix	6	3.00	18.00
Pedal kar	4	3.30	13.20
" " #124	1	2.65	2.65
" " #125	5	3.30	16.50
" " #1655	5	4.00	20.00
Scooter	2	1.60	3.20
Tubular velocipede #5	1	11.80	11.80
Trigycles #42	1	7.30	7.30
"	2	7.75	15.50
"	1	9.00	9.00
"	1	9.80	9.80
"	1	11.80	11.80
Car stroller	1	4.00	4.00
Wheelbarrows—red and green	12	.75	9.00
" #42	1	.75	.75
Skaebogans	10	1.60	16.00
Sleighs #2	35	1.06	37.80
" #3	47	1.25	58.75
" #4	22	1.50	33.00
" #5	35	1.88	64.06
" #9	1	2.33	2.33
Skis	4 pair	2.75	11.00
"	1 "	1.83	1.83
"	2 "	1.50	3.00
"	1 "	1.17	1.17
Household Appliances			
Coveralls	4	.75	3.00
Mops—dust	537	.75	$402.75
" "	1	.80	.80

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Household Appliances—Continued			
Mops, self wringing	2	20.90	$1.80
" squeezette	5	.90	4.80
Ironing board	29	1.83	53.07
" " pads and covers	1,000	.54	540.00
" " "	713	.16⅔	118.88
Curtain dryer	4	2.40	9.60
Clothes reel	298	.26	77.48
Folding clothes racks	8	3.20	25.60
Clothes fork	15	.23	3.45
" wheel	3	.23	.69
Bicycle wringer #770	3	3.77	11.31
Brass wash board #801	6	.23	1.98
Carpet sweeper	1	2.00	2.00
" "	8	19.50	156.00
" " Sterling	8	2.00	16.00
35 Rubber aprons	450	.18	81.00
Brooms	5	.75	3.75
Irons—#5 Elec. (without cord)	3	1.70	5.10
—San. sets	1	1.75	1.75
—Elec.	2	2.70	5.40
— "	2	1.50	3.00
—Berstea Bondon Bevel	8	1.60	12.80
Baskets			
Clothes	12	1.66	19.92
"	1	.40	.40
"	11	1.00	11.00
Hamper	6	2.90	17.40
"	5	3.90	19.50
Picnic	2	.71	1.42
"	1	3.75	3.75
Athletic outfits	3	3.75	11.25
Crayon sets BP	2	.28	.56
" " individual	296	.28	82.88
Dips set	13	.50	6.50
Jardinieres and saucers	3	.83	2.49
Dips set	3	.66	1.98
Jardinieres—without saucers	2	.66	1.32
" brass	2	8.00	16.00
" "	3	5.00	15.00
Door closer	132	.53	69.96
" " samples mounted	36	.52	18.72
Two-burner Elec. stove	1	5.00	5.00
Boston bag	4	3.25	13.00
Elec. heaters	4	5.00	20.00
Christmas cards	2,022 boxes	.42½	859.35
" " (shipment for Boston line)	6 cases		1278.09
Emery wheels	3	1.00	3.00
Candlesticks	8 set	3.00	18.00
Candles	1,188 boxes	.19	226.72
Marmalade jar	2	.60	1.20
Jelly dish	2	1.30	2.60
Bon bon dish	1	1.50	1.50
Mug	1	.75	.75
Relish dish	2	1.75	3.50
Knee iron foot	1	.35	.35
Beehive thermometer	8	2.00	16.00
Pasta holder	2	1.00	2.00

Article of merchandise	Quantity	Unit cost price to Minnesota Tea Company	Cost price to Minnesota Tea Company
PREMIUMS—Continued			
Baskets—Continued			
Pearl strings	8	$2.25	$18.00
Necklaces	4	.75	3.00
SUPPLIES			
Drums 50#	77	60.0¢	50.5
" 25# wooden coffee	92	46.	42.32
86 Sacks—peanut	18	06.	1.08
" grass	32	06.	2.56
" coffee	87	12.	10.44
Cans—Empty 5# coffee	1,680	10.	168.00
Excelsior	150 lbs.	02.	3.00
Delivery baskets	15	70.8	10.62
Cartons—Rice 3 lb	31,900	01.4	446.60
Bags—coffee 2# lined	1,500	00.635	9.53
" " 3 "	11,750	00.91	95.18
" " 4 "	10,500	00.96	100.80
" " 4 unlined	1,750	00.357	4.50
" " 2 "	24,750	00.261	64.60
" " 5 "	6 M	00.366	21.96
" " 12 "	500	00.3	1.50
" " 10 "	750	00.56	4.20
Flour tins 50#	12	113.3	13.60
" " 100#	4	170.4	6.82
Blue 1# bags (not printed) New Eng. Bag & Paper Co	2 M	00.42	8.40
Bags—Kraft sugar ABC 12 printed	11 M	00.3	33.00
" Size 2 printed	10 M	00.261	26.10
" " 14 "	9½ M	00.78	74.10
" " 16 "	7 M	00.85	59.50
" " 25 "	11⅓ M	-01.	113.00
" Kraft sugar ABC 10 printed	12 M	00.56	67.20
" Printed and lined size 12	17⅓ M	00.87	152.25
Cases for Ardsley silverware	6	250.	15.00
Tea cartons 16 oz	3,274	3580. M	117.20
" " 8 oz	13,360	3120. M	416.83
Coffee labels 3#	106,617	903. M	962.61
Freight on above.			41.91
Coffee labels 5#	4,652	350. M	16.28
Freight on above.			.10
Garage			
Valvoline Med. Heavy Motor Oil	27 gal.	80.705	19.05
Polarine Pressure Gen. grease	30 lbs.	.128	3.84
Rim (extra) 32 x 4		2.20	2.20
Tires			
Miller heavy duty balloon 31 x 5.25	2	18.80	36.60
Seiberling heavy duty balloon 31 x 5.25	2	17.50	35.00
Mason heavy duty cord 32 x 4	1	17.45	17.45
Goodrich heavy duty cord 32 x 4	2	16.60	33.20
87-88 Tubes			
Goodrich—Silvertown heavy duty 32 x 4	3	2.50	5.00
Mason heavy duty 32 x 4	1	2.50	2.50
Miller " " 31 x 5.25	2	2.65	5.30
Seiberling " " 31 x 5.25	2	2.95	5.70
			122,462.73

In Witness Whereof said Minnesota Tea Company has caused this full detailed inventory to be signed by E. C. Peterson, its President, and its seal hereunto affixed and attested by A. F. Peterson, its Secretary and Treasurer, this 17th day of August, 1928.

MINNESOTA TEA COMPANY,
By E. C. PETERSON,
President.

Attest:
By A. F. PETERSON,
Secretary and Treasurer.

Full Detailed List of The Creditors of Minnesota Tea Company, Their Address and the Amount Owing to Each Creditor, August 17th, 1928

Names	Address	Amount
E. C. Peterson	2023 W. Superior St., Duluth, Minnesota	$2,187.98
L. T. Peterson	2023 W. Superior St., Duluth, Minnesota	1,613.74
A. F. Peterson	2023 W. Superior St., Duluth, Minnesota	130.58
Duluth Nat'l Bank	2002 W. Superior St., Duluth, Minnesota	74,577.96
Northern Nat'l Bank	Alworth Building, Duluth, Minnesota	15,000.00
A. J. McCulloch	217 Lyceum Building, Duluth, Minnesota	4,500.00
Collector of Internal Revenue.	St. Paul, Minnesota	2,840.50
S. H. Eckman	509 Palladio Bldg., Duluth, Minnesota	2,000.00

STATE OF MINNESOTA,
County of St. Louis } *ss:*

E. C. Peterson, being first sworn, says that he is the President of Minnesota Tea Company; that the foregoing and above statement is a true and correct statement of the names of all the creditors of said Minnesota Tea Company, their respective addresses and the amount owing to each; and that the respective addresses and amount owing each is written opposite to the respective creditors.

E. C. PETERSON.

Subscribed and sworn to before me this 20th day of August 1928.

S. H. ECKMAN,
Notary Public, St. Louis County, Minn.

My Commission expires August 28, 1934.

Detail inventory of auto and delivery equipment transferred to Grand Union Co.

1928 license	Make of car	Model	Year	Serial no.	Motor no.	Company's no.	Date put in service	Depreciation to Aug. 4, 1928			Net book value
								Cost	Percent	Amount	
X 11030	Chev.	Truck	1927	21A A1266	2879877	1		$892.97			$892.97
B 1848	Olds.	"	1926	117	D47240	2	6/ 5/26	1,022.65	53	$531.86	490.97
X 9113	"	"	"	111	D24843	3	2/ 6/26	980.66	62	607.99	372.66
B 1849	Ford	"	1925		11487826	4	4/29/25	700.53	81	567.27	133.05
X 9108	Hupp	"	1922	73874	75630	5	2/ 1/29	385.37	12½	48.17	337.20
X 9131	Chev.	"	1927	21V284424	2804495	6	2/ 1/29	623.30	10	62.32	560.98
X 9110	Dodge	"	1923	686685	727531	7	6/15/26	336.77	3	10.70	326.07
X 9104	Hupp	"	1924	137870	1378270	8	7/25/25	600.00	75	450.00	150.00
X 9105	Hupp	"	1922	98272	90641	9	8/15/26	211.18	10	21.12	190.06
B 1808	Buick	Body only	1918	403844	403844	10	2/ 1/26	279.90	6	16.79	263.11
	Olds.	Truck	1928	CH24	F27351	11		1,191.22			1,191.22
X 9132	Chev.	"	1927	21V98756	2703317	12	2/ 1/29	623.30	10	62.32	560.98
B 3718	Hupp	"	1922	85239	69504	14	2/ 1/26	282.40	10	28.24	254.16
X 9000	Olds.	"	1926	102	D21160	15	1/ 1/26	967.60	64	618.86	348.12
X 9111	Dodge	"	1921	675263	734045	20	4/ 1/25	307.29	8	24.56	282.73
X 10859	Olds.	"	1928	C317	F7208	21	5/16/28	1,271.73	5	63.58	1,208.15
X 10860	"	"	1928	CH9	F7270	23	"	1,271.73	5	63.58	1,208.15
X 9100	Dodge	"	1922	748927	800794	28	8/11/26	157.65	10	15.70	141.90
X 9096	Olds.	Body only	1926	110	D25415	64	2/ 1/26	300.00	62	186.00	114.00
1318822	Dodge	Truck	1925	A197612	A270002	85	6/30/28	270.90	2	5.41	265.50
B 1850	"	"	1924	A197691	A269222	86	2/28/25	1,090.66	55	901.00	189.66
X 10861	Olds.	"	1928	CH10	F7202	27	5/16/28	1,271.73	5	63.58	1,208.15
X 9108	Dodge	"	1924	950462	A2782	38	2/ 1/26	930.65	62	577.00	353.65
X 9107	"	"	1925	A450132	A502114	29	10/ 9/25	1,085.90	70	734.50	310.30
X 9106	"	"	1925	A265870	A337907	30	3/ 6/25	1,090.00	85	901.00	189.00
X 9101	Olds.	"	1927	No 1026	E8004	31	2/15/27	992.75	35	336.46	656.29
X 10862	"	"	1928	CH8	F7257	32	5/16/28	1,271.73	5	63.58	1,208.15
X 9100	"	"	1928	1800	F64195	33	9/10/27	1,096.30	20	219.26	877.04
X 9102	"	"	1926	1004	E7341	34	9/12/26	969.27	50	484.63	484.64
X 10898	White	"	1928	189961	78938	40	2/ 1/28	2,454.95	10	245.50	2,209.45
B 255004	Hupp	Touring	1923	118503	115628		2/ 5/26	250.00	4	10.00	240.00
	1 bob sleigh, no value.							34,748.08		7,911.02	26,837.06

E. C. P., Pres.

	Description	Cost	Date purchased	Depreciation to August 1928		Net book value
1	Burns 2 bag roaster #15R477 completely installed including coffee hoppers, bucket elevators, pulleys, belting, and shafting and 7½ H. P. motor #1436745.	$2,990.91	June 1928	54%	$1,492.35	$1,448.56
1	Steel cut mill #27 installed with motor 3 H. P. #44420	1,400.00	June 1926	41%	582.20	857.80
1	Pulverizer with 3 H. P. motor #88066	100.00	June 1926	41%	41.00	59.00
1	Extra set of steel cutters for mill	215.00	Feb. 1925	34%	78.28	136.76
1	Toledo platform scale style #21A #241474	305.00	Oct. 1919	83%	253.15	51.85
4	Fire Extinguishers	48.00	Nov. 1926	16%	8.64	39.36
1	Cowan transveyor	70.00	Oct. 1922	56%	40.50	31.50
1	Electric hand drill #12533	48.44	Oct. 1926	17%	8.23	40.21
1	Scott Automatic weigher model C2612 not used	280.00	Nov. 1919	82%	205.00	45.00
2	Hand trucks	10.75	Fully dep	100%	10.75	
1	Hobart coffee mill, granulator and pulverizer #63248	994.95	Oct. 1920	36%	351.48	573.47
1	Automatic weigher (Edtbouer)	226.00	Dec. 1923	45%	101.25	125.75
1	Toledo no spring scale style 787BA #488308	165.00	Mar. 1926	4%	6.60	158.40
1	Toledo no spring scale style 253 #62377	110.00		100%	110.00	
3	Counterboy tape machines	105.00	July 1922	50%	53.50	52.00
3	4 wheel platform trucks	40.50		100%	40.50	
7	Fire Extinguishers	84.00	Nov. 1926	18%	15.12	68.88
1	Smith Exact weight scale	90.00	Dec. 1923	45%	40.50	49.50
1	Table 72 x 36 Salesmen room glass top	61.17	Nov. 1922	58%	35.48	25.69
6	Chairs " "	28.80	Nov. 1922	58%	16.70	12.10
1	Burroughs add. mach. (Hand) 7 Col #227781	350.00	Jan. 1918	100%	350.00	
1	" " " Elec 10 " #3-1199074	485.00	Dec. 1927	6%	27.90	477.10
1	" " " " " " #3-614519	450.00	Feb. 1930	75%	337.50	112.50
1	" " " " " 13 " #2-529055	615.00	Feb. 1923	66%	399.75	215.25
1	Underwood Typewriter #626330-12	107.50	Feb. 1927	15%	16.12	91.38
1	Monroe Calculator with stand	245.00	July 1927	10%	24.50	220.50
2	Diebold Safe Cabinets (Route Books)	1,400.00	Nov. 1922	58%	841.00	600.00
1	Set extra Drawers for 1 safe cabinet	76.64	May 1926	2%	1.53	75.06
4	All steel file cabinets with 2-2 drawer 5 x 8 card limits	170.00	Mar. 1926	24%	40.80	129.20
1	Flat top desk double glass top 48 x 60	96.34	May 1919	92%	90.11	6.23
3	" " " single " " 60 x 34	161.70	June 1922	51%	83.47	78.23
1	" " " " " 54 x 30	61.20	May 1918	100%	61.20	

Detail inventory of fixtures and equipment transferred to Grand Union Co.—Continued

	Description	Cost	Date purchased	Depreciation to August 1928		Net book value
1	Flat top desk single glass top 60 x 33	$65.70	Feb. 1922	65%	$42.71	$22.99
1	Typewriter desk " " 64 x 34	64.50	Nov. 1922	58%	37.41	27.09
5	Steel swivel chairs	70.65	Aug. 1927	10%	7.07	63.58
4	Oak swivel chairs	79.60	Aug. 1919	90%	71.64	7.96
2	Emeralite desk lights—double	38.65	Apr. 1924	42%	16.23	22.42
1	" " " "	15.65	Feb. 1922	65%	10.17	5.48
1	Kardex cabinet 9 drawer	69.50	July 1925	30%	20.85	48.65
1	Check protector model V #457929	90.00	July 1923	50%	45.00	45.00
1	Fire Extinguisher	12.00	Nov. 1926	18%	2.16	9.84
1	Flat top double desk glass top Private office	167.00	Nov. 1922	58%	96.86	70.14
2	Swivel chairs " "	85.00	Nov. 1922	58%	49.30	35.70
1	Aireator " "	30.00	Apr. 1928	3%	.90	29.10
1	Leather Settee " "	65.00	May 1924	43%	27.95	37.05
1	Line-a-time	18.00	Jan. 1924	46%	8.28	9.72
1	Round coffee testing table	126.00	Nov. 1927	8%	10.08	115.92
1	Brass Tea kettle	45.00	Nov. 1927	8%	3.60	41.40
1	Big cuspidor	24.00	Nov. 1927	8%	1.92	22.08
5	cuspidors	17.70	June 1922	60%	10.62	7.08
1	Iron safe—Cury Mfg. Co. #32475	303.45	May 1918	100%	303.45	----------
1	National 3 drawer cash register	300.00	Oct. 1923	48%	144.00	156.00
1	Peanut roaster complete with motor Style #6 25 pound capcaity #5236	290.34	Nov. 1925	28%	81.29	209.05
1	Toledo no spring scale style 418A #140373	85.00	— 1917	100%	85.00	----------
1	Countarboy tape machine	34.30	Aug. 1926	20%	6.86	27.44
2	Class display shelves (double) 41" long	23.72	Feb. 1923	55%	13.05	10.67
2	" " " " 27" "	21.50	Feb. 1923	55%	11.83	9.67
2	All glass show case—marble base	300.00	Feb. 1923	55%	165.00	135.00
1	Fire Extinguisher	12.00	Nov. 1926	18%	2.16	9.84
1	Pressure grease gun	46.75	Nov. 1925	38%	17.76	28.99
1	Weaver jack	32.50	Jan. 1923	55%	17.87	14.63
1	Walker roller car jack	32.50	Nov. 1925	38%	12.35	20.15
16	Steel product lockers and					
13	Double Berloy clothes lockers, including installation in garage	509.16	New.		----------	509.16
		14,548.04			7,072.45	7,475.59

1	Standing desk in store				
2	Stools " "				
1	High chair with back in store				
1	Locker counter & 4 shelf rack (for curtains, etc.) 110" long				
1	Glass show case with wooden base 120" long				
3	Glass show case with marble base 96" long				
1	" " " " " " 37" "				
1	" " " " wooden frame 34" "				
1	Jewelry show case with beveled plate glass windows, with counter, base and 5 double door lockers				
	Shelving on west wall				
3	Oak tables for dish display 36 x 72				
1	" " " " " 108 x 30				
1	Dining room table in window				
2	Small stools " "				
1	Counter with marble base 192" long—east side				
1	Hobart coffee mill with Granulator #71253				
1	Show case with wooden frame 72" long				
1	Display shelving on east wall 235" long in store				
4	Sections walker bins (4 double) with bottom in store				
1	Section Mdse. display shelves on top of walker bins 180" long in store	$2,406.82		$2,134.47	$272.35
1	Section Mdse. display shelves on top of walker bins 158" long in store				
1	High wooden mdse. display case 86" long 95" high at end of walker bins in store				
1	High chair with back in office				
1	Wooden file cabinet 4 drawers " "				
1	" " " 3 Sec				
	3 drawer each in office				
1	Card file cabinet (wooden) 4 drawers in office				
2	Westinghouse electric fans in office				
1	Old flat top desk glass top 30 x 30 in office				
2	Arm chairs				
1	Corner office shelving—private office				
1	Hat rack " "				
3	3' x 10' steel plates for floor—Basement				
1	5' x 10' " " " " "				
6	Snow shovels "				
1	45 hole bag rack shipping room				
1	21 " " " " "				

Detail inventory of fixtures and equipment transferred to Grand Union Co.—Continued

OTHER EQUIPMENT UNIT COST OF WHICH IS NOT REFLECTED ON THE BOOKS—Continued

	Description	Cost	Date purchased	Depreciation to August 1928	Net book value
1	Large counter shipping room				
2	Sections walker coffee bins (8 bins to sec.)				
	Shipping room				
1	Walker counter bin (9 sections) Shipping room				
1	" coffee bin section 14 " " "				
1	Bradley stenciling machine " " "				
1	Weed chain tool " " "				
1	Wall clock " " "				
		$16,954.86		$9,206.92	$7,747.94

E. C. P., *Pres.*

95 *Accounts and Bills Receivable Transferred to The Grand Union Company by Minnesota Tea Company as Per Bill of Sale, August 1928*

Premium balances @ 60 percent	$34,261.19
Product balances @ 100 percent	50,540.30
Miscellaneous accounts	881.35
Notes Receivable	124.59
	85,807.43
Less doubtful accounts	10,295.22
	75,512.21

E. C. P., *Pres.*

This Agreement, Made this 23rd day of August 1928 between Minnesota Tea Company, first party, and The Grand Union Company, second party.

Witnesseth: A bill of sale of this date has been executed by first to second party, and it is agreed that the total consideration to be paid by second to first party is Four Hundred Twenty-three Thousand Nine Hundred Eighty-seven Dollars and Forty-two Cents ($423,987.42) in cash and voting trust certificates for eighteen thousand (18,000) shares of fully paid and nonassessable common stock, without par value, of second party, a Delaware corporation.

It is further agreed that as of the delivery date, August 25, 1928, $360,000.00 in cash shall be paid by second to first party, and that $40,000.00 additional cash, with six per cent per annum interest from August 25, 1928, shall be paid within thirty (30) days from said August 25, 1928, and that the remaining $23,987.42 shall also be paid in cash within said thirty (30) days from August 25, 1928, with interest at six per cent per annum; or, in lieu of said $23,987.42, the second party, at its option, may deliver to first party voting trust certificates for said amount of fully paid and nonassessable common stock, with no par value, of The Grand Union Company, a Delaware corporation, at the rate of Twenty-five Dollars ($25.00) per share, and in case second party elects to pay said $23,987.42 by voting trust certificates, no interest on said amount shall be figured, and the certificates may be delivered at the same time as required in the original option for the delivery of such certificates for 18,000 shares. In case second party delivers said voting trust certificates in place of cash, the same limitations upon their transfer shall apply as upon the certificates for 18,000 shares.

96 It is further agreed that as of August 25, 1928, the first party will assign to second party any insurance policies other than life insurance policies and policies on buildings, and in addition to all other sums the second party will pay first party, on account thereof, a proportionate part of the premiums on said policies corresponding to the part of the term of said policies not yet expired.

In Witness Whereof the parties have executed this instrument the day and year first above written.

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President.*
And A. F. PETERSON, *Secretary.*
THE GRAND UNION COMPANY,
By J. S. WEED, *President.*
[SEAL] And L. P. SHIELD, *Secretary.*

Know All Men By These Presents That Minnesota Tea Company, a Minnesota corporation, first party, in consideration of the sum of One Dollar ($1.00) and other valuable considerations (the exact consideration to be determined and paid in accordance with an option agreement made by Minnesota Tea Company and O. B. Westphal, dated July 2, 1928, as modified by supplemental agreement, dated July 24, 1928, between said Tea Company and said Westphal), does hereby grant, bargain, sell, and convey unto The Grand Union Company, a corporation of the State of Delaware, second party, its successors and assigns, forever, the following described goods, chattels, and personal property, to-wit:

All assets of every kind and description owned by first party upon the 4th day of August 1928 excepting real estate, buildings, fixtures, cash, and the interest of first party in any insurance policies on the lives of any and all of its officers and excepting insurance on buildings and fixtures which it may have owned on August 4th, 1928, but including the good will and all trade-marks and trade names and the right to use the name of "Minnesota Tea Company", and including all automobiles and all machinery and instrumentalities heretofore used in its business, even though such machinery and instrumentalities may be attached to the buildings, and including all bills, notes, and accounts receivable of every description owned by the first
97 party on August 4th, 1928, whether considered doubtful or not, and including all moneys deposited in the bank account heretofore opened in the name of "Minnesota Tea Company Special Account", as provided in said agreement of July 24, 1928, and including all assets of which first party was in possession on August 4th, 1928, through purchase or agreement of purchase, even though the technical legal title might not have passed to it, other than the above-excepted items, and including all property of whatever kind or description which the first party owns at the date of this instrument.

An inventory of the merchandise, certified under the name of first party by its President, which is covered by this bill of sale is hereto attached and made a part hereof, and a summary of the accounts and bills receivable covered by this bill of sale is also hereto attached and made a part hereof, and a list of the automobiles and trucks covered by this bill of sale is also hereto attached and made a part hereof; but the fact that said specific lists of merchandise, accounts, and bills receivable and automobiles is attached shall not be deemed to exclude any of said items that may have been omitted from said

lists, the intention hereof being to include all of the property above described as covered by this bill of sale, whether specifically mentioned in said lists or not.

To Have and To Hold unto the second party, its successors and assigns, Forever. And the first party, for itself and its successors, does covenant and agree to and with the second party, its successors and assigns, to warrant and defend the sale of said goods, chattels and personal property, and the rights hereby conveyed, unto the second party, its successors and assigns, against all and every person and persons whomsoever, lawfully claiming or to claim the same, or any lien or interest therein or right thereto, and covenants that all of said property is free from any encumbrance.

And the first party further covenants that it has not disposed of any of its assets or collected any accounts receivable, other than in the normal conduct of its business, since July 2, 1928, and that in case it is owing any amounts on any of the property covered by this bill of sale then it shall pay and discharge such amounts, it being understood and agreed that any bills incurred since August 4, 1928, for any purchase of merchandise or expense of running the business are to be absorbed by the second party, it being the understanding and agreement that the said business has been operated for the account of the second party since August 4, 1928, to and including the delivery date hereof as of August 25, 1928.

98 First party further agrees, for the considerations aforesaid, immediately to change its name to a name satisfactory to second party and that it will not hereafter engage in the Wagon Route tea and coffee business in any part of the United States, and for the considerations aforesaid first party further agrees that it will not, for a period of one year from August 25, 1928, dispose of any of the voting trust certificates to be received by it, other than to its stockholders, and that if it disposes of any of the same to any of its stockholders it will cause them, at the time of the acquisition, to enter into an agreement with second party that for such period they will not sell or dispose of any of the same to be acquired by them.

In Witness Whereof first party has caused this instrument to be executed, in its corporate name, by its proper officers and its corporate seal to be hereunto affixed, this 23rd day of August 1928.

MINNESOTA TEA COMPANY,
By E. C. PETERSON,
President.
And A. F. PETERSON,
Secretary.

Signed, Sealed, and Delivered in Presence of:
W. D. BAILY,
S. H. ECKMAN.

This Agreement, Made this 23rd day of August 1928, between Minnesota Tea Company, first party, and The Grand Union Company, second party,

Witnesseth: A bill of sale of this date has been executed by first to second party, and it is agreed that the total consideration to be paid by second to first party is Four Hundred Twenty-three Thousand Nine Hundred Eighty-seven Dollars and Forty-two Cents ($423,987.42) in cash and voting trust certificates for eighteen thousand (18,000) shares of fully paid and nonassessible common stock, without par value, of second party, a Delaware corporation.

It is further agreed that as of the delivery date, August 25, 1928, $360,000.00 in cash shall be paid by second to first party, and that $40,000.00 additional cash, with six percent per annum interest from August 25, 1928, shall be paid within thirty (30) days from said August 25, 1928, and that the remaining $23,987.42 shall
99 also be paid in cash within said thirty (30) days from August 25, 1928, with interest at six per cent per annum; or, in lieu of said $23,987.42, the second party, at its option, may deliver to first party voting trust certificates for said amount of fully paid and nonassessable common stock, with no par value, of The Grand Union Company, a Delaware corporation, at the rate of Twenty-five Dollars ($25.00) per share, and in case second party elects to pay said $23,987.42 by voting trust certificates, no interest on said amount shall be figured, and the certificates may be delivered at the same time as required in the original option for the delivery of such certificates for 18,000 shares. In case second party delivers said voting trust certificates in place of cash, the same limitations upon their transfer shall apply as upon the certificates for 18,000 shares.

It is further agreed that as of August 25, 1928, the first party will assign to second party any insurance policies other than life insurance policies and policies on buildings, and in addition to all other sums the second party will pay first party, on account thereof, a proportionate part of the premiums on said policies corresponding to the part of the term of said policies not yet expired.

In Witness Whereof the parties have executed this instrument the day and year first above written.

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President.*
And A. F. PETERSON, *Secretary.*
THE GRAND UNION COMPANY,
By J. S. WEED, *President.*
And L. P. SHIELD, *Secretary.*

Before United States Board of Tax Appeals.

MINNESOTA TEA COMPANY, PETITIONER
VS.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT
E. C. PETERSON, PETITIONER
VS.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT
A. F. PETERSON, PETITIONER
VS.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT
100 L. T. PETERSON, PETITIONER
VS.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 54227, 60837–60839
Promulgated June 30, 1933

1. The acquisition by one corporation of substantially all the properties of another corporation is not, of itself, a statutory reorganization under section 112 (i) (1), Revenue Act of 1928. Such acquisition, to come within section 112 (i) (1) (A), must be part of a strict merger or consolidation or of something which partakes of or resembles a merger or consolidation and involves a continuance of essentially the same interests through modified corporate form.

2. In determining whether a statutory reorganization exists, the definition of section 112 (i) (1) must be read in its entirety and part A may not be applied so as to stultify part B.

3. Three persons owning all the shares of a corporation conducting a local business cause the corporation's assets to be transferred to another existing corporation with nation-wide activities, for cash, which is immediately distributed, and 7½ percent of the shares of the larger corporation. The local corporation continues its existence, holding as its assets the acquired shares, and the individuals continue as its shareholders. Held, not a statutory reorganization, the local corporation being taxable upon a gain measured by the difference between the cost of the assets transferred and the sum of the cash and value of shares received, and the individuals being taxable upon the cash dividend received.

C. J. McGuire, Esq., for the petitioners.
Prew Savoy, Esq., and George D. Brabson, Esq., for the respondent.

Opinion

STERNHAGEN: The respondent determined deficiencies in the income taxes of the petitioners as follows: Minnesota Tea Co., $11,587.64 for the period January 1, 1928, to August 24, 1928; E. C. Peterson, $15,982.31 to 1928; A. F. Peterson, $646.66 for 1928; and L. T. Peter-

son, $15,974.76 for 1928. There is no explanation for the use of a short tax period for the Minnesota Tea Co., although it is stated in the notice of deficiency of January 26, 1931, that "it is still a going concern." The facts are stipulated, and findings are unnecessary.

The Minnesota Tea Co., engaged in the retail grocery business, negotiated in 1928 for the transfer of its business to the Grand
101 Union Co. Its shares were all owned by the three Petersons, and, so far as appears, still are. Before making the transfer to the Grand Union Co., it transferred its real estate and some miscellaneous property to the Peterson Investment Co., newly created for the purpose, in exchange for the Peterson Co.'s shares, which it immediately distributed proportionately among its three shareholders. Thus reduced, the entire assets of the Minnesota Co., the statutory cost of which was $254,646.62, were transferred to the Grand Union Co. for $426,842.52 cash and 18,000 shares (voting trust certificates) of Grand Union no-par common, which it agreed not to sell for a year. The 18,000 shares were neither distributed nor sold. The $426,842.52 was distributed among the three shareholders, who assumed, and paid, the Minnesota Co.'s liabilities amounting to $106,471.73. At the time of the receipt by the Minnesota Co. of the cash and shares, its undistributed earnings and profits were $109,442.83. The outstanding shares of the Grand Union Co. were at this time 239,726, and they were being sold on the New York Stock Exchange for around 30.

Several questions are raised as to the gain resulting to each of the petitioners from these transactions and as to the recognition thereof as a statutory matter; but such questions are predicated upon the idea that there was a statutory reorganization, as that term is defined by section 112 (i) (1),[1] Revenue Act of 1928. Whether there was such a reorganization must, therefore, be first decided. If there was no such reorganization, there is no foundation for the petitioners' attack on the deficiencies, and the respondent's determinations must be sustained; while if a statutory reorganization occurred, the measure of the resulting tax must be determined with regard to other statutory provisions.

At the time when the deficiencies were determined, there was a disposition to read the statutory definition with a superficial
102 regard for its language, and thus to say that the acquisition by one corporation of substantially all the properties of another corporation was per se a reorganization. The extent of this

[1] Sec. 112. Recognition of Gain or Loss.

* * * * * * *

(i) Definition of reorganization.—As used in this section and sections 113 and 115—
(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * * * *

literalism is indicated by Sarther Grocery Co. vs. Commissioner, 63 Fed. (2d) 68, in which the view was urged by the taxpayer that a sale for cash of all its properties by one corporation to another was a reorganization. See Tulsa Oxygen Co., 18 B. T. A. 1283; National Pipe & Foundry Co., 19 B. T. A. 242; First Nat. Bank of Champlain, 21 B. T. A. 415; Robert D. Green, 24 B. T. A. 719. In Cortland Specialty Co., 22 B. T. A. 808, the Board gave a broader consideration to the definition and, although there was "no question whatsoever but that substantially all of the [one] company's properties were acquired by the [other]", held that there was no reorganization.

In the development of the law by the courts, the literal view has never gained a foothold. The Fifth Circuit Court of Appeals, in Pinellas Ice & Cold Storage Co. vs. Commissioner, 57 Fed. (2d) 188, the first court decision on the subject, took quite the opposite view, saying:-

It must be assumed that in adopting paragraph (h) (of section 208, Revenue Act of 1926, to which the section now under consideration is similar) Congress intended to use the words "merger" and "consolidation" in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point.

A few months later the Second Circuit Court of Appeals, in Cortland Specialty Co. vs. Commissioner, 60 Fed. (2d) 937, held that the acquisition by one corporation of all the properties of another was not to be treated by itself as a statutory reorganization; that such acquisition, to be within the statute, must be related to what would in general legal parlance be referred to as a reorganization, but that the concept of such reorganization was not as restricted as the Fifth Circuit Court of Appeals had held, as being confined to technical mergers or consolidations, but could include other arrangements whereby there was substantially a continuance of the same interests in the business and properties affected, the change being only a modification in corporate form or structure.

The Supreme Court in Pinellas Ice & Cold Storage Co. vs. Commissioner, 287 U. S. 462, held that the absolute view of the
103 Fifth Circuit Court of Appeals was too narrow an interpretation of the statute. The Supreme Court cited with approval the opinion of the Second Circuit Court of Appeals in Cortland Specialty Co. vs. Commissioner, supra. It said that the parenthetical expression, "the acquisition of substantially all the properties of another corporation"; has the effect of "expand[ing] the meaning of 'merger or consolidation' so as to include some things which partake of the nature of a merger or consolidation, but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or con-

solidation." It held that the situation before it "has no real semblance to a merger or consolidation."

In the light of these decisions, it is now the law that the parenthetical expressions may not be considered separately, but only as parts of the entire section of the statute, and hence that the acquisition by one corporation of substantially all of another's properties is not of itself, enough to constitute a statutory reorganization, but must be part of a strict merger or consolidation or of something which partakes of the nature of a merger or consolidation and has a real semblance to a merger or consolidation and involves a continuance of essentially the same interests through a modified corporate structure.

This construction of part (A) of the definition must be shaped to fit into the definition as a whole. There is a plain intendment to correlate part (A) and part (B), for both deal with the change of ownership among corporations of their properties. Whether there be any substantial significance in the fact that (A) treats of the acquisition, thus apparently emphasizing the receiving side of the transaction, while (B) treats of the transfer, the opposite facet, is perhaps unimportant here; for, however that may be, they must both be construed to effect.[3] (A) may not be read so broadly in respect of the acquisition of property for stock as to stultify (B), dealing with the transfer of property for stock. Such a transfer, to be a reorganization under (B), must comply with the prescribed condition,—"if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred", and it would not do to treat as a reorganization a transfer for less than control through the device of
104 calling it a merger and thus bringing it within (A). While, therefore, there is latitude in the term merger, there is at the same time the necessity of keeping it within the bounds of (A) and not invading (B).

There is substantial difficulty in this. Some overlapping seems inevitable. It is therefore better not to attempt to formulate a rule of construction, which by its very language may serve to constrict the operation of the statute more narrowly that was intended. It is only important to fulfill the purpose indicated by the language of the statute. The underlying purpose of this section is to permit a change in the form of ownership which in essence does not affect continuance of the same actual ownership of substantially the same properties without fear of tax at the time of the formal change. In the case of a true merger or consolidation, the immunity from tax is extended beyond this purpose, since to the shareholders the result is to give him new shares representing properties in some of which he theretofore had no interest. While through modified forms he has

[3] An examination of the history of these provisions seems to indicate that there was no deliberate design to differentiate between the phraseology of (A) and (B), but only to bring together, within the definition of reorganization, language which had already been used in separate parts of the statutory scheme.

a continuing interest in the same assets, although in a lessened proportion, he also acquires an interest in entirely new assets.

Is this, then, an arrangement which for the purpose of the statute so far partakes of the nature of a merger or consolidation or resembles it as to bring about the same tax result, notwithstanding it is not the transfer of properties for controlling shares of the transferee? Three persons owning all the shares of a corporation conducting a local business cause the corporation's assets to be transferred to another existing corporation with nation-wide activities, for cash, $426,842.52, which is distributed to them, and approximately 7½ percent of the shares of the large corporation, worth approximately $540,000. The local corporation continues its existence, holding as its assets the acquired shares, and the individuals continue to be the owners of their original shares. We think it is not within the scope of the statute.

The nature of the transaction is the same as that treated in (B) except for the condition. Omitting consideration of the cash received, since its effect is found rather in subdivision (d) than in the definition of subdivision (i), there was a transfer by one corporation of all its properties to another for stock in the transferee, but instead of being in control, which by subdivision (j) means the ownership of at least 80 percent of the transferee's shares, there is ownership by the transferor of only 7½ percent of such shares. Thus the transaction appears to be far from a continuing interest
105 in the same property through a mere change in forms of ownership but rather an almost complete change in the essential assets owned; and this still disregards the large proportion of cash received.

This wide departure from the percentage of stock upon which (B) is conditioned, in a transaction which is otherwise within that part of the definition, should make us slow to find (A) nevertheless applicable. The parties to the transaction deliberately for their own purposes refrained from a merger. Furthermore, they chose an arrangement which avoided the result of a merger. Instead of the shareholders of the Minnesota Co. owning shares of the Grand Union Co., as they would have if there had been a merger, they continued to own Minnesota shares; and instead of the Minnesota Co.'s disappearance as in a merger, its existence and powers continued, and as the owner of the Grand Union shares it brought about a freedom from immediate tax upon the dividends upon such Grand Union shares, since by section 23 (p) such dividends are deductible by a corporation simultaneously with their receipt as gross income, while to an individual shareholder dividends are subject to surtax.

This decision does not restrict (A) to technical mergers. It still leaves room for a more expansive application of the statute. It might be suggested, for example, that by having the assets of the Minnesota Co. transferred to the Grand Union in exchange for shares and then having the Minnesota Co. promptly distribute such shares among its own shareholders in liquidation and dissolve, so that in all substantial

respects the outcome would have been the same as if a true merger had occurred, the petitioners might properly have invoked part (A) of the definition. How much further from a true merger they might have gone and yet achieved what the statute calls a reorganization, we do not attempt to say. It is enough now to hold that the facts before us go further than the statute implies, and that there was no reorganization.

In this view the Minnesota Co. realized a gain measured by the difference between the $254,646.62, cost of its property, and $966,842.52, being the sum of $426,842.52 cash and $540,000, the value of the 18,000 shares of Grand Union Co. Section 111. This gain of $712,195.90 may not escape recognition. Section 112 (a).

The question is suggested whether the 18,000 shares of Grand Union stock were without fair market value, since there was a covenant against its sale within a year after its receipt. The petitioners say they do not press the point before the Board, but "preserve it for
106 the purpose of the record." The restriction was a contractual obligation and therefore voluntary, and does not, in our opinion, leave the shares without fair market value, as that term is meant to be used in the statute. See Newman vs. Commissioner, 40 Fed. (2d) 225. This fair market value we find to be $30 a share.

As to the Petersons, it follows from the foregoing that the distribution to them, as shareholders, of the cash surplus was, after being reduced by the amount of the liabilities assumed, $106,471.73, an ordinary dividend subject to surtax.

Reviewed by the Board.

Judgment will be entered under Rule 50.

MARQUETTE concurs in the result.

Dissenting opinion

VAN FOSSAN, dissenting: It seems clear to me that the prevailing opinion goes much further than is warranted, either by the language of the revenue acts or by the authoritative decisions of the courts. It reads into the statute a concept and a limitation neither written in nor intended by Congress.

Dissenting opinion

BLACK, dissenting: The effect of the majority opinion as I construe it is to interpret paragraph (1) (A) of section 112 (i) of the Revenue Act of 1928, which now reads: "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)" as if the last clause quoted above were made to read: "or substantially all the properties of another corporation if immediately after the transfer the transferor or its stockholders or both

are in control of the corporation to which the properties are transferred." I find no warrant for reading into the statute this language which is not there.

In support of the conclusion which it reaches, the majority opinion cites Cortland Specialty Co., 22 B. T. A. 808; affd., 60 Fed. (2d) 937; and Pinellas Ice & Cold Storage Co. vs. Commissioner, 287 U. S. 462. I do not think these two cases are authority for what the Board holds in the instant case.

In the Cortland Specialty Co. case, one corporation transferred its assets to another in consideration of cash and promissory notes. The Board held that the transaction was not a reorganization but simply a sale by one corporation of its assets to another. This view was upheld by the Circuit Court of Appeals for the Second Circuit,
107 the court holding that the transaction did not come within section 203 (e), Revenue Act of 1926, because the property received for the assets sold did not include "stock or securities", the notes received not being so classifiable. There was no continuity of interest on the part of the transferor corporation or its stockholders in the property sold because neither the selling corporation nor its stockholders received stock in the purchasing corporation. The situation in Pinellas Ice & Cold Storage Co. was pretty much the same. There two corporations owned by the same stockholders sold their assets to a third corporation for cash and promissory notes. No stock or other securities of the purchasing corporation were received. The Supreme Court held that the transaction was a mere sale of assets and did not partake of any of the features of either a merger or a consolidation. The court was, however, careful to point out that the words within the parenthesis of (A) might not be disregarded. On that point the court said:

* * * The words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes.

In the instant case the seller acquired an interest in the affairs of the purchasing company to the extent of 18,000 shares (voting trust certificates) of its no-par common stock. This, in my opinion, gave the transferring corporation that continuing interest in the new enterprise which brings the transaction within the definition of (A) above quoted. As to the cash received in the transaction, it is taxable to the corporation to the extent of the gain realized, unless dis-

tributed to the stockholders in pursuance of the plan of reorganization. This is so by reason of section 112 (d) of the Revenue Act of 1928, which reads:

If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property
108 received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

It is my understanding that it is under the foregoing provision that the Commissioner has determined that there is a taxable gain to the corporation in this proceeding to the extent of $106,471.73. On the date that petitioner, the Minnesota Tea Co., transferred all of its assets to the Grand Union Co. for 18,000 shares of its common stock plus $426,842.52 in cash, pursuant to resolutions authorizing the transfer, it immediately distributed the cash pro rata to its shareholders, the petitioners, E. C., A. F., and L. T. Peterson, who assumed and thereafter duly discharged all of its liabilities. The petitioners Peterson received cash in the amount of $426,842.52 and assumed and paid liabilities of $106,471.73, each thereby receiving his pro rata portion of the net distribution of $320,370.79. Respondent has held this taxable to each of the petitioners Peterson as dividends received from the corporation and has held the $106,471.73 taxable to the corporation as profit from the transfer of assets, received *in cash and not distributed to the stockholders in pursuance* to a plan of reorganization. The Commissioner contends that this $106,471.73 was impressed with a trust, that the stockholders should use it to pay the debts of the corporation, and that this is not a distribution to stockholders within the meaning of the statute above quoted, but is equivalent to the corporation itself using the money to pay its debts. With this view I agree. The majority opinion, however, does not affirm the deficiency against the corporation on that ground, but on the ground that there was no reorganization and the whole transaction was taxable. With this view, for reasons I have already stated, I disagree. I do not discuss the question as to whether the $320,370.79 admittedly distributed to the petitioners Peterson is all taxable to them as dividends as determined by respondent, or only a part as contended by petitioners. The
109 majority opinion having affirmed the deficiencies on the ground that there was no reorganization, I am content to record my dissent to that holding.

Before United States Board of Tax Appeals

[Title omitted.]

Motion for rehearing and granting thereof

Filed July 29, 1933

Now comes the Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, general counsel, Bureau of Internal Revenue, and moves the Board for an order authorizing a rehearing of this case in order that the Commissioner may make claim for an increased deficiency, and as grounds for said motion and in support whereof shows:

1. That this case was tried before this Board on October 12, 1932, and the opinion of the Board was promulgated on June 30, 1933, resolving all issues in favor of respondent.

2. That at the time the deficiencies in question were asserted and at the time the case was tried before the Board there was a disposition on the part of the Commissioner of Internal Revenue to treat the acquisition by one corporation of substantially all of the properties of another corporation as a reorganization per se under the provisions of section 112, Revenue Act of 1928; and the deficiency asserted against this taxpayer in the deficiency notice was based upon the theory that there was such a reorganization, the amount of taxable gain therefrom being limited to the amount of cash used to satisfy the creditors of the petitioner corporation.

3. That this case was tried upon the assumption that upon the facts stipulated therein there was a reorganization within the meaning of section 112, Revenue Act of 1928.

4. That the Board now holds that under the facts so stipulated no reorganization took place within the meaning of said section, and that, therefore, the petitioner was taxable upon the entire profit realized upon the sale or exchange of its assets for cash and stock of the Grand Union Company.

5. That if the final order of the Board is allowed to be
110 entered upon the basis of the deficiency notice, approximately $605,723.27 of taxable income computed in accordance with the Board opinion will not be taxed.

That under the decisions of this Board the petitioner's income-tax liability arose and became a liability against it independently of any action upon the part of the Commissioner of Internal Revenue in asserting or assessing a tax against it. A. F. Dean et al., 27 B. T. A. ——, decided June 23, 1933.

6. It is noted that in its opinion the Board held that the petitioner realized a "gain of $712,195.90, which may not escape recognition." It is further noted that in the sixty-day deficiency notice the re-

spondent asserted a tax only upon the amount of cash paid to creditors, to wit, $106,471.73.

Wherefore, in view of the facts found by the Board herein, it is prayed that this motion be granted.

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
GEORGE D. BRABSON,
Special Attorney,
Bureau of Internal Revenue.

Granted Aug. 1, 1933.

(Signed) JOHN M. STERNHAGEN,
Member U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Motion of petitioner to set aside order granting rehearing and denial thereof

Filed September 1, 1933

Counsel for respondent in the above-entitled and numbered cause under date of July 29, 1933, filed a motion for rehearing, which said motion was granted under date of August 1, 1933, without hearing thereon and without prior notice to petitioner or to counsel for petitioner.

Comes now petitioner, by its counsel, and respectfully moves that the order of the Board be set aside and that the motion for rehearing be denied. Petitioner's motion is based upon the following reasons:

111 (1) Although designated "Motion For Rehearing", in fact and in substance the motion is for leave to move for an increased deficiency. It is respectfully submitted that simply designating a motion as a particular thing does not make the motion that particular thing. The General Counsel has not asked for any rehearing. Admittedly in his motion he accepts the decision of the Board and, therefore, there is no subject matter for a rehearing.

(2) The granting of a motion for leave to ask for an increased deficiency contravenes the provisions of section 274(e) of the Revenue Act of 1926, which reads as follows:

"The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing."

(3) The granting of respondent's motion is contrary to the decision of the Board in Selwyn Operating Corporation vs. Commissioner, 11 B. T. A. 593. In that decision the Board stated:

"The rule is clear and unquestioned that, although a motion or petition for a new trial or rehearing is addressed to the discretion of the court and this discretion may be broadly exercised, there must be some legal ground for the action sought, both alleged in the pleading and proven to the satisfaction of the court. State vs. Place (S.D.), 107 N. W. 829; Ohio Railroad Co. vs. Stein, Ind.), 31 N. E. 180; 19 L. R. A. 733."

It is respectfully submitted that even if respondent's motion could be considered a motion for rehearing, he has stated no ground for such motion. He has not indicated that he has any new evidence to submit; he has not pleaded substantial error at trial or fraud or mistake. In other words, if a rehearing is to be had, respondent intends to do nothing except move for an increased deficiency. He does not want a rehearing and he does not ask for a rehearing.

(4) Any further action in this case necessitated by the decision of the Board, which decision is not attacked by counsel for respondent, can be accomplished under Rule 50. The Board and the courts have decided that a motion for an increased deficiency may
112 not be made at a Rule 50 hearing. (Davidson vs. Commissioner [60 F. (2d) 59]). In stating that his motion was a motion for rehearing, respondent has endeavored to circumvent and violate the provisions of section 274(e) of the Revenue Act of 1926.

(5) Whether or not income will escape taxation in the event respondent's motion for leave to ask for an increased deficiency is denied is immaterial. Congress necessarily had knowledge that income might escape taxation when it enacted section 274(e) of the Revenue Act of 1926. In respect of the decision of A. F. Dean et al., vs. Commissioner, 27 B. T. A. #95, it is respectfully submitted that such decision has absolutely no bearing on and lends no support to the motion of counsel for respondent.

As petitioner's motion for rehearing was granted without notice to counsel for petitioner and as the granting of such motion occurred in a case reviewed by the Board and as no adequate grounds for a rehearing have been presented by counsel for respondent, it is respectfully requested that this motion be reviewed by the Board and a hearing thereon granted.

Wherefore, for good cause shown, it is respectfully prayed that this motion be granted.

J. MARVIN HAYNES,
Counsel for Petitioner.

916 Investment Building, Washington, D. C.
Sept. 1, 1933.
Denied Sep. 29, 1933.

(Signed) JOHN M. STERNHAGEN,
Member U. S. Board of Tax Appeals.

Before U. S. Board of Tax Appeals

Statement

Filed at Hearing November 8, 1933

IT:AR:D-3
SON

In re: Minnesota Tea Company, Duluth, Minnesota.

Income Tax Liability

Year, 1928:

Income tax liability	$84,274.54
Income tax assessed	11,587.64
Deficiency	72,686.90

113 The tax liability shown herein has been recomputed in accordance with the order of the United States Board of Tax Appeals, Docket #54227, promulgated June 30, 1933.

JBW-1

Minnesota Tea Company. Year ended December 31, 1928.

Schedule 1

Net income as shown in sixty-day letter dated January 26, 1931		$96,563.66
Net income as revised		702,287.83
Net increase		605,724.17

EXPLANATION OF CHANGE

In accordance with the decision of the United States Board of Tax Appeals the transfer of your business to the Grand Union Company, which resulted from negotiations in 1928, was not a statutory reorganization under section 112(i)(1) of the Revenue Act of 1928 and a taxable gain has been computed measured by the difference between the cost of assets transferred and the sum of the cash and value of shares received.

Increase in taxable income		$605,724.17
Profit on assets transferred:		
Consideration received for assets transferred to Grand Union Company—cash	$426,842.52	
18,000 shares (voting trust certificates) of Grand Union no-par common, market value $30.00 per share	540,000.00	
Total	966,842.52	
Statutory cost of assets	254,646.62	
Taxable gain	712,195.90	
Profit previously taxed	106,471.73	
Increase as above		605,724.17

Computation of tax

Net income adjusted	$702,287.83
Less credit	None.
Income subject to tax	702,287.83
Tax at 12%	84,274.54
Tax previously assessed	11,587.64
Deficiency in tax	72,686.90

JBW-1

114 Before United States Board of Tax Appeals, Washington

DOCKET No. 54227

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination, November 13, 1933

This proceeding duly came on for rehearing, over petitioner's objection, whereupon respondent moved for judgment in accordance with his amended answer in the amount of $72,686.90, the computation of which petitioner agrees is in accordance with the Board's opinion. The petitioner contests both the jurisdiction and propriety of the Board to enter such a judgment, and moves instead for the entry of judgment of $11,587.64, the amount of the deficiency originally determined. This counter-motion is denied. It is

Ordered, Adjudged and Decided that there is a deficiency of $72,686.90 in petitioner's income tax for the period January 1, 1928 to August 24, 1928.

Enter

Entered
Nov. 13, 1933.

(Signed) JOHN M. STERNHAGEN,
Member.

25412—35——7

In United States Circuit Court of Appeals for the Eighth Circuit

[Title omitted.]

Petition of Minnesota Tea Company for review of decision of United States Board of Tax Appeals

Filed Feb. 5, 1934

To the Honorable Circuit Court of Appeals for the Eighth Circuit:

The petition of Minnesota Tea Company, a corporation organized under the laws of the State of Minnesota and having its principal place of business at Duluth, Minnesota, respectfully shows:

One: This is a proceeding for review by the United States
115 Circuit Court of Appeals for the Eighth Circuit, of a decision of the United States Board of Tax Appeals entered November 13, 1933, redetermining a deficiency in income taxes for the calendar year 1928 in the amount of $72,686.90, petitioner having filed its income-tax return for said year with the Collector of Internal Revenue at St. Paul, Minnesota.

Two: The nature of the controversy before said Board of Tax Appeals was the redetermination of the deficiency in income taxes for the period January 21, 1928, to August 24, 1928, and, in particular, whether petitioner realized a taxable gain as a result of the transactions hereinafter set forth. The controversy comes up for review as follows:

(1) The petitioner is a Minnesota corporation and was engaged in the business of selling teas, coffees, and groceries at retail. On July 14, 1928, petitioner caused to be formed the Peterson Investment Company, a Minnesota corporation, and transferred to it certain of its assets in exchange for the entire capital stock of Peterson Investment Company. The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments, and other miscellaneous assets. Immediately upon receipt of the stock in Peterson Investment Company, it was distributed by petitioner pro rata among its stockholders.

(2) On August 23, 1928, petitioner transferred all of its assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of common stock of said Grand Union Company and $426,842.52 in cash.

(3) Upon receipt of said cash and stock, the petitioner immediately paid the entire sum of $426,842.52 to its stockholders in proportion to their stock holdings, pursuant to an agreement by all of the stockholders, whereby in consideration of such distribution, said stockholders agreed to pay all the corporate debts of the petitioner, whether due and payable or not and whether certain or contingent. The stock was retained by petitioner; and the amount of liabilities of petitioner on August 23, 1928, which were assumed and discharged by the stockholders of petitioner pursuant to said agreement, was $106,471.78.

(4) Respondent, in determining the proposed deficiency herein, added to petitioner's taxable income the amount of $106,471.73, representing an alleged profit realized upon the transfer of petitioner's assets to Grand Union Company, the tax so determined amounting to $11,587.64.

116 (5) As the matter came before the Board of Tax Appeals, the sole issue was whether petitioner realized a taxable gain of $106,471.73 as a result of the transactions above set forth.

(6) The matter came on for hearing before the Board of Tax Appeals at Washington, D. C., upon the petition of petitioner requesting the redetermination of the determination of the Commissioner of Internal Revenue. The answer of the Commissioner as respondent was duty filed and the case was at issue on the points as detailed above. The appeal was thereafter heard by the Board, the Honorable John A. Sternhagen sitting for the Board.

(7) The facts in the case were presented by stipulation. The case was presented to the Board of Tax Appeals upon the assumption by both the petitioner and the respondent that the state of facts stipulated indicated a statutory reorganization under Sec. 112 (i) (1) of the Revenue Act of 1928. Prior to the issuance of its decision, the Board indicated that it was in doubt as to whether the assumption of both parties that there had been a reorganization was correct; and petitioner's counsel was advised thereof and thereafter filed a memorandum upon that question. Thereafter and on the 30th day of June 1933 the Board of Tax Appeals made and filed its opinion (two members dissenting), wherein it was determined that there was no reorganization, and holding that petitioner was taxable on the difference between the value of the stock and cash received and the cost of the properties transferred.

(8) Thereafter the respondent, on July 29, 1933, filed a motion for rehearing "in order that the Commission may make claim for an increased deficiency", which motion was granted ex parte; and thereafter, and on November 8th, 1933, a proceeding was held pursuant to the granting of said motion, as a result of which the Board of Tax Appeals, on November 13, 1933, entered a judgment against the petitioner in the amount of $72,686.90 instead of $11,587.64, as found by the Commissioner.

(9) The petitioner, being aggrieved by said findings of the Board, opinion, decision, and orders, files this petition for a review thereof.

Assignments of error

Three: The errors committed by the Board of Tax Appeals, upon which the petitioner relies as a basis of this proceeding, are as follows:

(1) The Board erred in holding that the petitioner is taxable
117 on the difference between the value of the stock and cash transferred to it by Grand Union Company, and the cost of the properties transferred.

(2) The Board erred in holding that the petitioner realized a taxable gain in any amount whatsoever, as the result of the transactions above set forth and appearing in the stipulated facts.

(3) The Board erred in increasing the tax above that found by the Commissioner, since a timely motion for an increased deficiency was not filed by the respondent.

(4) The Board erred in holding that the transactions above set forth and appearing in the stipulated facts, did not constitute a reorganization, as defined in Sec. 112 (i) (1) of the Revenue Act of 1928.

(5) The Board erred in holding that the petitioner had failed to establish that there was no taxable gain, as a result of the transactions set forth in the stipulated statement of facts.

(6) The Board erred in holding that the payment of $426,842.52 to the stockholders of the petitioner did not constitute a distribution of the full amount pursuant to the plan of reorganization, as provided in Sec. 112 (b) (4) and Sec. 112 (d) of the Revenue Act of 1928.

(7) The Board erred in redetermining the deficiency in an amount not claimed by the respondent.

(8) The Board erred in granting the motion for rehearing, for the reason that the same was nothing more than a motion for leave to move for an increased deficiency, which said motion was not made at the hearing of the case.

(9) The Board erred in ordering that judgment should be entered under Rule 50, since judgment should have been entered in the amount of the deficiency determined by the respondent.

(10) The Board erred in rendering the decision for the respondent.

Wherefore your petitioner prays that this Honorable Court may review the action of the Board of Tax Appeals in this cause, reverse the decision of the Board and direct the entry of the decision by said Board in favor of the petitioner, determining that there is no deficiency in income tax for the year 1928 due from the petitioner; and for such other and further relief as may to this Court appear proper in the premises.

OSCAR MITCHELL,
Attorney for Petitioner.

118 [Duly sworn to by E. C. Peterson, jurat omitted in printing.]

Before U. S. Board of Tax Appeals

Notice of filing of petition for review

Filed February 5, 1934

To The Commissioner of Internal Revenue, Washington, D. C.:

Please take notice that the attached petition for review of the decision of the United States Board of Tax Appeals, in the above entitled matter, has been this day filed with the clerk of the United States Board of Tax Appeals.

Dated February 5th, 1934.

OSCAR MITCHELL,
Attorney for Petitioner,
1200 Alworth Building, Duluth, Minn.

Service of the above accepted on the 5th day of February, 1934:

E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

119 In United States Circuit Court of Appeals for the Eighth Circuit

March Term, 1934

Wednesday, March 14, 1934

MINNESOTA TEA COMPANY, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order That Transcript of Proceedings be Included in Transcript on Appeal

Filed March 20, 1934, United States Board of Tax Appeals

The above-named petitioner having filed its verified petition herein, praying that this Court issue its order authorizing and directing the United States Board of Tax Appeals and the Clerk thereof to incorporate in the transcript on appeal heretofore taken to this Court the transcript of the proceedings before Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals, at Washington, D. C., on November 8, 1933; and it appearing that the General Counsel, Bureau of Internal Revenue, on behalf of the Commissioner of Internal Revenue, Respondent, has consented that such transcript be included herein.

It Is Hereby Ordered That the United States Board of Tax Appeals and the Clerk thereof be, and they are hereby, ordered and directed to include and incorporate into the transcript on appeal herein the transcript of the proceedings before Honorable John M.

Sternhagen, Member of the United States Board of Tax Appeals, at Washington, D. C., on November 8, 1933, and the whole thereof.

Dated March 14th, 1934.

[Clerk's certificate to foregoing paper omitted in printing.]

120 Before the U. S. Board of Tax Appeals

Docket No. 54227

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Transcript of Proceedings Before Hon. John M. Sternhagen Member of United States Board of Tax Appeals

Filed November 14, 1933

Hearing at Washington, D. C. Date, Nov. 8, 1933. Smith & Hulse, Official Reporters. U. S. Board of Tax Appeals, 1742 K Street NW., Washington, D. C.

Reporter's Minutes

Hearing at Washington, D. C., on the 8th day of November 1933, at 9:50 o'clock a. m.

The above-entitled cause came on for hearing on this the 8th day of November 1933, before Honorable John M. Sternhagen, member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing heretofore given; whereupon the following proceedings were had, to-wit:

Appearances: C. J. McGuire, Esq. (916 Investment Bldg., Washington, D. C.), on behalf of the petitioner; George D. Brabson, Esq. (E. Barrett Prettyman, Esq., General Counsel, Bureau of
121 Internal Revenue), on behalf of the Commissioner of Internal Revenue, Respondent.

Proceedings

The MEMBER. What is to be done now?

Mr. MCGUIRE. There is very little to be done, your Honor, as I see it. The case is before your Honor this morning on rehearing. I would like, if I may, briefly, to restate the facts leading up to the situation as it stands today.

The MEMBER. I think I have the history of the case pretty clearly in my mind.

Mr. MCGUIRE. I am sure your Honor does.

The MEMBER. If you will tell me what you think the present status is, Mr. McGuire, what your rights are, I will hear you.

Mr. MCGUIRE. I would like to enter an objection before any proceedings are held this morning to the jurisdiction of the Board to proceed on a rehearing at this time. I object to the Board doing

anything other than entering a judgment in the amount of the deficiency shown in the sixty-day letter which is appended to the petition.

The MEMBER. That is in effect an exception to the denial of your motion.

Mr. MCGUIRE. This objection goes to the question of the jurisdiction of the Board to proceed at this time.

The MEMBER. Yes.

Mr. MCGUIRE. I also take exception, for the purpose of the record, to the action of the Board in granting the respondent's motion for a rehearing and in granting respondent's motion to file an amendment to his answer, both of which motions were granted ex parte.

The MEMBER. You may have your exception. Your objection is overruled.

Mr. BRABSON. I would like to state for the record, your Honor, in case of appeal, that the Board's opinion in this case was promulgated on June 20, 1933. Your Honor is, of course, familiar with the provisions of that opinion, the holding in that opinion, and I may state for the record that that opinion was reviewed by the Board.

In accordance with that opinion, it was indicated that the
122 petitioner in this case is liable to taxation upon whatever gain it had realized by the sale or exchange of its assets for cash and stock of the Grand Union Company.

In accordance with that opinion, the respondent thereupon and thereafter filed a motion for rehearing on July 29, 1933, asking specifically in that motion for authority to make claim for increased deficiency. That motion of respondent was granted on August 1, 1933.

The petitioner thereupon filed his motion to set aside the Board's order to that effect. That was filed on September 1, 1933, and was denied by the Board on September 29, 1933.

The respondent thereupon, in due course, filed, on October 25, 1933, his motion to file an amended answer, accompanied by the amended answer, in which the respondent made claim for the additional deficiency in accordance with the facts stipulated before the Board and in accordance with the Board's opinion.

I may say that that motion was accomplished by the respondent's amendment to the respondent's answer. That was granted by the Board under date of October 27, 1933.

So that I conceive the case stands before your Honor today on the motion for rehearing having been granted. Therefore, we are here today to retry this case to the extent that it is necessary to retry it. The respondent has amended his pleading in accordance with his motion. That is all that the respondent requested in this motion and that is all that respondent desires now. I, accordingly, at this time, close the respondent's case and submit it to your Honor for decision.

Mr. McGUIRE. If your Honor please, I move for judgment in the amount of $11,587.64, which is the tax liability shown in the sixty-day letter, because it is apparent that the respondent has turned this hearing into a Rule 50 hearing, and under three decisions by the Circuit Court of Appeals, the Board has no authority to increase a deficiency at a Rule 50 hearing.

I would like to cite some cases, if your Honor desires them.

The MEMBER. Those are the cases you cited?

Mr. McGUIRE. Two of them, but there is one additional one.

The MEMBER. What is the other one?

Mr. McGUIRE. State Consolidated Oil Company vs. Commissioner, decided by the Circuit Court of Appeals for the 9th Circuit.

123 The MEMBER. That is to the same effect as the Davidson case, in the 2nd Circuit?

Mr. McGUIRE. That is right, your Honor.

Mr. BRABSON. May I have the citation?

Mr. McGUIRE. I do not have the citation just now. It is State Consolidated Oil Company vs. Commissioner.

The MEMBER. Mr. Brabson, are the pleadings in your opinion now in shape for the entry of a final judgment?

Mr. BRABSON. I think they are, your Honor.

The MEMBER. In what amount? Where does the amount of the final judgment now appear?

Mr. BRABSON. I think, your Honor, that I had the impression that the respondent's recomputation had been filed. If not, I have it ready to file at this time. I take it, however, that the respondent would ask for the entry of an order in this case for judgment to be entered under Rule 50. If not, I can file at this time respondent's recomputation.

The MEMBER. I perhaps misunderstood your motion. I understood it was for the entry of judgment, and if it was I wanted to know whether the record is now in such shape that the amount of the judgment will be apparent from the record so that it can be entered.

Mr. BRABSON. Yes, your Honor, it is for entry of judgment. It is not apparent from the state of the record. I will then withdraw my motion for judgment, and will assume to state that the case is now submitted for the Board's determination.

Mr. McGUIRE. In the amendment to the answer there is a statement to the effect that there is a recomputation attached to it. I have no copy of that and no recomputation was ever served on me.

The MEMBER. The recomputation that was filed was not served on you?

Mr. McGUIRE. No, your Honor. It says:

"Respondent prays that the contentions of the petitioner be denied and that a deficiency in tax be redetermined against the taxpayer for the period January 1 to August 24, 1928, in accordance with the attached recomputation."

There was no recomputation attached.

124 The MEMBER. It seems to me there has been pretty sloppy work done here, because attached to the amendment to the re-

spondent's answer is what purports to be a carbon copy of some kind of a statement, and that statement results apparently in a deficiency in tax of $72,686.90. In the first place, a carbon copy ought not be filed with your answer. In the second place, the copy that is to be served on the other side ought to be attached to it. All the attachments should be filed with the Board.

Mr. BRABSON. I took it that it was the function of the Board to serve the copy of the answer.

The MEMBER. Yes; but the Board cannot serve it if it is not filed with the Board. My first criticism is that you sent a carbon copy with the original papers to be filed with the Board in the permanent docket of the Board.

Mr. BRABSON. I understand that, your Honor. I cannot conceive how that was done.

The MEMBER. That is my first criticism with regard to sloppy work.

Mr. BRABSON. I think that is quite deserved, your Honor.

The MEMBER. The second one is that my assumption is there was no copy appended to the copies to be served, and for that reason they were not served. Now, that may be incorrect, but that is the natural assumption.

Mr. BRABSON. Very true, your Honor.

The MEMBER. If that is so, of course we cannot enter judgment until the petitioner has had an opportunity to analyze and test the amount. So that a Rule 50 order would have to enter. If Mr. McGuire, on his analysis, finds that $72,000 is in accordance with the opinion, whether that opinion be right or wrong, justified or unjustified, it can be stipulated between you, and the case then taken to court.

Mr. MCGUIRE. I can do that right now, your Honor, in a minute. But I do not think your Honor has yet passed on my motion for judgment.

The MEMBER. No; I have not passed on your motion. I am inquiring, at the outset, as to whether the judgment is apparent on the face of the record. The petitioner's motion for judgment in the amount which is stated in the motion is denied.

125 Mr. MCGUIRE. I note an exception to that, your Honor.

The MEMBER. I think we ought to have the record show what the situation in this case is that leads up to this point, and it is this—that the case was presented upon an assumption on the part of both sides that the state of facts stipulated indicated a statutory reorganization. The case was submitted prior to the Supreme Court's decision in Pinellis Ice Company case, in which the definition of reorganization in the statute was considered, and a somewhat new light was thrown upon that definition. Certainly the definition which the Circuit Court of Appeals of the 5th Circuit had adopted was modified by the Supreme Court, and the decision of the 2nd Circuit Court of Appeals in the Corcoran Specialty Company case, taken with the Supreme Court decision in the Pinellis case, made it necessary to reconsider the construction of the statute.

That being so, it became a matter of doubt within the Board as to whether the hypothesis which the parties had adopted, namely, that there had been a statutory reorganization, was a sound hypothesis; and since it was in the realm of law and not of fact, the Board felt that it was not bound by the parties' own postulate. For that reason the parties were, as the Division, consisting of myself, thought, advised by their counsel to appear before the Division in order that that doubt might be made known and the parties given an opportunity to present their views about it before the Board decided it. In other words, it was uppermost in the minds of the Board that a question of law should not be decided to the surprise of both sides when they themselves had not given it consideration and had assumed that it was to be taken in a certain way.

With that in mind, and this case having been heard simultaneously with the case of the three shareholders of this petitioner, namely, the Petersons, it was overlooked that the Minnesota case had Mr. Brabson for the Respondent's counsel, while in the Peterson case Mr. Savoy was the respondent's counsel, all the cases being tried by Mr. McGuire for the petitioners. Mr. Savoy and Mr. McGuire were asked to come in. Mr. Babson was not asked to come in.

Since the question that was raised in the mind of the Board was a question which tended only to operate adversely to the petitioner, there was no prejudice, insofar as the petitioner was con-
126 cerned, because its counsel was the same in both cases and he was made fully aware of the question and given an opportunity to brief it. He did brief it, by a printed brief; and the respondent's counsel in the Peterson cases filed something that he called a memorandum of law, which was all, apparently, he wanted to file in any event, and so the question was presented in issue. After considering that issue, the Board decided that there was no statutory reorganization and that, so far as the record shows, was the first time that counsel for respondent in the Minnesota case was aware of that question being in the case. Now, had he been called in, in the first place, when he should have been called in, the assumption is that he would have amended his pleading then or—

Mr. McGuire. Then I wish to object anyway, your Honor.

The Member. There is no occasion for you to object to anything that I say. I am not making a ruling.

Mr. McGuire. Do I understand this to be a record being made?

The Member. Yes.

Mr. McGuire. Then I wish to object anyway, your Honor.

The Member. Very well; you may object at the close of my remarks.

The assumption that I must indulge is that counsel would have done what properly he should have done had he been aware of the situation, namely, to move for permission to amend his answer so as to effectuate to the fullest extent any decision which might come from the Board; but, not being present at that time, and having been unaware of the further proceedings, no such motion to amend

was made. With reasonable promptness after the decision of the Board was rendered, the amendment to the answer was filed, or rather the motion to amend the answer for the purpose of claiming an increase in the deficiency to the extent that might result from the application of the doctrine that the Board announced, was filed. It was an obviously fair, just, and valid request. There seemed no occasion for a hearing on it. The statute expressly provides that the Board shall have jurisdiction to order an increase in the deficiency if claim therefor is made at or before the hearing or any rehearing.

So that there is a clear Congressional intent that rehearings
127 are within the scope of the Board's proceedings. For that reason, the motion to amend for the sole purpose of making a claim for an increase in the deficiency was granted. The answer was filed, and the case was then assigned for rehearing, which, of course, is limited to the purpose of the motion.

The petitioner has at all times objected to this procedure on the part of the Board, has resisted any further conduct of the case, has resisted any increase in the deficiency, and still resists. At all stages the petitioner's objections have been overruled, and they are now overruled; and if it is agreed between the parties that the proper computation which will effectuate the Board's opinion is embodied in this statement attached to the answer, amounting to $72,686.90, the judgment will be entered in that amount, with proper exception to the petitioner.

Mr. McGUIRE. I do not contest that figure, your Honor; but I object to any judgment being entered in any amount greater than the amount of $11,000.

Mr. BRARSON. If your Honor please, I submit such a recomputation at this time. A copy of it has been served upon counsel for the petitioner.

The MEMBER. In view of the fact that petitioner now feels he has had ample opportunity to consider the amount and does not dispute it, then judgment will be entered for that amount in the course of the day.

Mr. McGUIRE. I would like to know, your Honor, if I can make a short statement in answer to the statement your Honor made. I will state it off the record if you desire.

The MEMBER. No; you can state it on the record.

Mr. McGUIRE. I want the record to show that I understood and Government counsel understood that we were dealing with the Peterson cases, and the so-called memorandum of law which your Honor referred to which was filed was filed after Mr. Savoy's and my discussion with your Honor after the decision of the Pinellis and Specialty Company cases. That memorandum or purported memorandum--

The MEMBER. Yes; but the hearing was had.

Mr. McGUIRE. Yes; and that memorandum, as I understand it, is not a part of the record in this case, but it did concede that the Gen-

eral Counsel still considered this nontaxable reorganization, and stated in there that his decision, as reflected in the sixty-day
128 letter, was not affected in any way, in his opinion, by the decisions in the Pinellis and Corcoran Specialty Company cases. Now, if that memorandum is going to be injected into the case, I would like to have that clearly indicated in the record.

The MEMBER. Yes; I think it should be clear. I will say this about it, that these cases, so far as my own understanding of the situation is concerned, involved essentially the same question. They grew out of the question whether this was a reorganization, and if there was a reorganization, the tax liability of the Tea Company, as well as the tax liability of these shareholders, were obviously affected. I say obviously in order to avoid any idea that you might have to look at both of them and analyze the situation carefully to see whether one was affected and the other was not. On the very face of things, both the shareholders and the corporation were affected.

In my opinion there is no basis in reason for an attitude of differentiation by the same counsel in both cases as between the desire to apply the same principle to the corporation as to the individuals; and if there is an understanding, or was an understanding, on the part of the petitioner's counsel that he was dealing only with the Peterson case, then I say that understanding is wholly unjustified, and I cannot reconcile it with an intelligent attitude. I think an intelligent attitude would have understood that all of the effect of that question was upon both the shareholders and the corporation.

Mr. MCGUIRE. May I speak, your Honor, in view of that statement?

The MEMBER. Yes.

Mr. MCGUIRE. Your Honor denied a motion to consolidate these cases and stated that your Honor would not consider them together, when counsel for respondent, Mr. Savoy, objected to them being consolidated.

The MEMBER. That is, they would not be heard together.

Mr. MCGUIRE. They would not be heard and would not be consolidated, your Honor. That is the reason for my intelligent understanding.

The MEMBER. That is wholly consistent. The trial of the case involved different facts as to the shareholders from the facts
129 as to the corporation, but the question as to the extent to which the statutory definition of reorganization impinges upon the case was precisely the same with respect to the shareholders as with respect to the corporation; so that while the trial of the two cases should have been separated, the result of the supplemental question did not involve any separation. All that is in the realm of reason and understanding, and there is room for a difference of view as to how it could be understood.

Mr. MCGUIRE. There is a difference in this matter. If we appeal one case and do not appeal the other, we only go up on the record in one case and not on the record in the other case.

The MEMBER. It is inconceivable that there will be an appeal in one of these cases and not in the other.

Mr. McGUIRE. I will say that very thing is under consideration.

The MEMBER. There may be practical reasons, but there is no legal distinction. If this Board is wrong in its definition of statutory reorganization, that error redounds to the benefit of the shareholders as well as to the corporation.

However, I think the record is clear now as to where everybody stands. I am not saying anything by way of criticism.

Mr. McGUIRE. Except I would like to have the record show that I would not even concede that if the General Counsel, Mr. Brabson, had been called in when Mr. Savoy and I were called in, he would then have had an opportunity to amend his answer and ask for an increased deficiency, because the pleadings had been closed, and it was then too late. So, regardless of whether or not he was diligent, as I assume he would have been and as your Honor assumes he would have been, I would like the record to show it is my opinion that it was then too late for him to make any motion or ask any increased deficiency.

The MEMBER. I understand that. Judgment will be entered for the amount of $72,686.90.

Mr. McGUIRE. Did your Honor note my objection and give me an exception.

The MEMBER. Yes. Your objection is overruled and you may have an exception.

130 (The above and foregoing are all of the proceedings had in the above-entitled matter; whereupon, at 10:20 o'clock a. m., the hearing was concluded.)

Before U. S. Board of Tax Appeals

Praecipe for Transcript

Filed March 10, 1934

To: E. Barrett Prettyman, Esquire, General Counsel, Bureau of Internal Revenue, Washington, D. C.

Please Take Notice That the petitioner in the above-entitled proceeding designates the following portions of the Record in this cause to be incorporated into the transcript on its appeal:

1. Docket entries of the proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals.
3. Agreed statement of facts.
4. Opinion and decision of the Board of Tax Appeals.
5. Respondent's motion for rehearing and order thereon.
6. Petitioner's motion to set aside order granting respondent's motion for rehearing.
7. Rule 50 computation.
8. Petition for Review and proof of service.

10. Transcript of proceedings before Board of Tax Appeals on November 8, 1933.
11. Judgment.
12. This praecipe.

The foregoing transcript to be prepared conformably to law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

Please Take Further Notice That on the ------ day of ------, 1934, at 9:30 o'clock a. m., I shall move that the above por-
131 tions of the Record, as designated, be incorporated in the transcript on appeal heretofore taken to the United States Circuit Court of Appeals for the Eighth Circuit.

Respectfully,

(Sgd.) OSCAR MITCHELL,
Attorney for Petitioner,
1200 Alworth Building, Duluth, Minnesota.

Dated March 10, 1934.

[Clerk's certificate to foregoing transcript omitted in printing.]

In United States Circuit Court of Appeals for the Eighth Circuit

[Title omitted.]

Order that transcript of proceedings be included in transcript on appeal

132 The above-named petitioner having filed its verified petition herein, praying that this Court issue its order authorizing and directing the United States Board of Tax Appeals and the Clerk thereof to incorporate in the transcript on appeal heretofore taken to this court the transcript of the proceedings before Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals, at Washington, D. C., on November 8, 1933; and it appearing that the General Counsel, Bureau of Internal Revenue, on behalf of the Commissioner of Internal Revenue, Respondent, has consented that such transcript be included herein,

It Is Hereby Ordered That the United States Board of Tax Appeals and the Clerk thereof be and they are hereby ordered and directed to include and incorporate into the transcript on appeal herein, the transcript of the proceedings before Honorable John M. Sternhagen, Member of the United States Board of Tax Appeals, at Washington, D. C., on November 8, 1933, and the whole thereof.

Dated March 14, 1934.

Consent of respondent

The undersigned, on behalf of the Commissioner of Internal Revenue, respondent herein, does hereby consent that the United States Circuit Court of Appeals for the Eighth Circuit may sign and issue

the foregoing order, upon presentation thereof by counsel for the petitioner, without notice or hearing thereon.

Dated this 10th day of March 1934.

ROBERT H. JACKSON,
Attorney for Commissioner of Internal Revenue, Respondent.

In United States Circuit Court of Appeals for the Eighth Circuit

[Title omitted.]

Petition for inclusion of transcript of proceedings of November 8, 1933, in record on appeal

Filed March 14, 1933

133 To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Your petitioner, Minnesota Tea Company, respectfully petitions and shows to the Court as follows:

On November 13, 1933, the United States Board of Tax Appeals entered a judgment against the petitioner herein in the amount of $72,686.90, being the deficiency in said amount in petitioner's income tax for the period January 1, 1928, to August 24, 1928. To obtain a review of said action of the Board of Tax Appeals and of its decision thereon, petitioner has caused to be filed all the necessary papers and documents, including a petition for review by this Court.

Among the errors assigned by petitioner in its said petition for review is the following:

"(8) The Board erred in granting the motion for rehearing, for the reason that the same was nothing more than a motion for leave to move for an increased deficiency, which said motion was not made at the hearing of the case."

Also the following assignment of error:

"(9) The Board erred in ordering that judgment should be entered under Rule 50, since judgment should have been entered in the amount of the deficiency determined by the respondent."

The judgment so to be reviewed herein is in words and figures as follows:

"Judgment

"This proceeding duly came on for rehearing, over petitioner's objection, whereupon respondent moved for judgment in accordance with his amended answer in the amount of $72,686.90, the computation of which petitioner agrees is in accordance with the Board's opinion. The petitioner contests both the jurisdiction and propriety of the Board to enter such a judgment, and moves instead for the entry of judgment of $11,587.64, the amount of the deficiency originally determined. This counter motion is denied. It is

"Ordered, adjudged, and decided that there is a deficiency of $72,686.90 in petitioner's income tax for the period January 1, 1928, to August 24, 1928.

"Entered 11/13/33.

[SEAL] (Sgd.) JOHN M. STERNHAGEN,
Member.

134 The Court will note that the proceeding on which said judgment was ordered is called a "rehearing" in said judgment. This proceeding took place before the Honorable John M. Sternhagen, member of the United States Board of Tax Appeals, at Washington, D. C., pursuant to notice of hearing given, on the 8th day of November 1933, and at said hearing there were appearances on behalf of the petitioner and on behalf of the respondent.

Said proceeding consisted of certain motions on behalf of the petitioner and certain motions on behalf of the respondent, together with statements of the contentions of said petitioner and the rulings of the Board of Tax Appeals thereon.

It is the contention of the petitioner that said hearing of November 8th, 1933, was a motion for leave to move for an increased deficiency; that said motion was not timely nor proper, and that said United States Board of Tax Appeals had no jurisdiction to grant such a motion for an increased deficiency for the reason that said motion was not made at a hearing or rehearing of the case.

It therefore becomes necessary, in order to present these questions to this Court and to urge the points involved in assignments of erorr numbered 8 and 9 above quoted, that a transcript of the proceedings before the United States Board of Tax Appeals on November 8, 1933, be included in the record to be filed with this Court.

Petitioner has duly served upon the respondent and has caused to be filed a præcipe, in which the transcript of proceedings before the Board of Tax Appeals on November 8, 1933, is designated to be incorporated into the transcript on said appeal.

That the United States Board of Tax Appeals, through its clerk, has indicated that it will not incorporate the transcript of said proceedings of November 8th, 1933, in the record on said appeal without an order of this Court.

Wherefore petitioner prays that this Court issue its order authorizing and directing the United States Board of Tax Appeals and the Clerk of said Board to incorporate in the transcript on appeal heretofore taken to this Court, the transcript of proceedings before the Honorable John M. Sternhagen, member of the United States
135 Board of Tax Appeals, on November 8th, 1933, at Washington, D. C., as designated in the præcipe herein.

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President,*
Petitioner.

[File endorsement omitted.]

[*Duly sworn to by E. C. Peterson, jurat omitted in printing.*]

136–137 [Appearances of counsel omitted in printing.]

138 IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted.]

Minute entry, Nov. 27, 1934

These causes, Nos. 10031, 10032, and 10033, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. Homer Hendricks for petitioners, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

139 IN UNITED STATES CIRCUIT COURT OF APPEALS

Minute entry, Nov. 28, 1934

These causes, Nos. 10031, 10032, and 10033, having been called for further hearing, argument was resumed by Mr. Homer Hendricks and by Mr. James G. Nye for petitioners and concluded by Mr. J. Louis Monarch, Special Assistant to the Attorney General, for respondent.

Thereupon, these causes were submitted to the court on the transcripts of the records from said Board of Tax Appeals and the briefs of counsel filed herein.

140 In United States Circuit Court of Appeals,
Eighth Circuit

No. 10,031. March term, A. D. 1935

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to review decision of United States Board of Tax Appeals

March 25, 1935

Mr. Homer Hendricks and Mr. James G. Nye (Mr. Oscar Mitchell, Mr. C. J. McGuire, Messrs. Mitchell, Gillette, Nye, and Harries, and Messrs. Miller and Chevalier were with them on the brief), for petitioner; Mr. J. Louis Monarch, Special Assistant to the Attorney General (Mr. Frank J. Wideman, Assistant Attorney General, and Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, were with him on the brief), for respondent; Mr. Ellsworth C. Alvord and Mr. Edward H. McDermott submitted brief amicus curiae.

Before SANBORN, WOODROUGH, and BOOTH, Circuit Judges

Opinion

141 BOOTH, Circuit Judge, delivered the opinion of the court.

This is a petition for review of a decision of the Board of Tax Appeals.

The decision and the order based thereon redetermined a deficiency in the income tax of petitioner for the period of January 1, 1928, to August 24, 1928, in the sum of $72,686.90.

The salient facts stipulated before the Board of Tax Appeals and leading up to the decision and order of redetermination are substantially as follows: the petitioner is a Minnesota corporation and was, until the transfer of its assets hereinafter mentioned, engaged in the business of selling teas, coffees, and groceries at retail. All of its stock was owned by three individuals.

In July and August 1928 it negotiated and completed a transfer of its business to the Grand Union Company, and, leaving out of consideration a preliminary disposition of certain real estate and assets not of vital importance in the present controversy, it made the transfer of its assets and business, pursuant to a plan described as a reorganization plan and approved by its board of directors and by its stockholders, in substantially the following manner: it turned over all of its property to Grand Union Company, receiving in exchange $426,842.52 cash and voting-trust certificates representing 18,000 shares of the no-par common stock of Grand Union Company having a market value of about $30 a share, or a total of $540,000.

The $426,842.52 cash was distributed immediately to the three stockholders of the Minnesota Tea Company, and they assumed and paid liabilities of that company amounting to $106,471.73, leaving them net $320,370.79. The voting-trust certificates were retained and continued to be held by the Minnesota Tea Company.

The respondent, Commissioner of Internal Revenue, held that the word "distribute", as used in section 112 (d) (2) of the 1928 Revenue Act should be interpreted to mean a distribution to stockholders to be used for their own benefit, and not a distribution to or for the benefit of creditors; and that the Minnesota Tea Company did not distribute the cash received by it to the extent of the amount of its debts, namely, $106,471.73.

142 The Commissioner further held that there was a deficiency in the income tax of the Minnesota Tea Company in the sum of $11,587.64.

The Commissioner also held that the transfer from the Minnesota Tea Company to the Grand Union Company was a "reorganization", as set out in section 112 (i) (1) (A) of the 1928 act, "in that it was the acquisition by one corporation of all the properties of another corporation." The Commissioner cited G. C. M. 3827, VII-2 C. B. 114.

The matter was thereafter brought before the Board of Tax Appeals for review upon the issue whether the petitioner had realized a taxable gain of $106,471.73 as a result of the transactions above set forth.

The petition and the answer before the Board of Tax Appeals did not raise any issue as to "reorganization." The Board of Tax Appeals, however, of its own motion, raised the question whether there had been effected a statutory reorganization, and in its decision held that there was no reorganization, and held, further, that the petitioner by said transaction realized a gain measured by the difference between $254,646.62, the cost of its property, and $966,842.52 (being the sum of $426,842.52 cash and $540,000, the value of the 18,000 shares of the Grand Union Company); and the Board of Tax Appeals further held that this gain of $712,195.90 was taxable. This decision of the Board of Tax Appeals was promulgated June 30, 1933.

Thereafter, the following proceedings were had before the Board of Tax Appeals. On July 29, 1933, respondent Commissioner filed a "motion for rehearing", which motion was granted ex parte.

Petitioner thereafter filed a motion to set aside the order granting the rehearing. This motion was denied.

October 25th respondent filed a "motion for leave to file an amended answer." The motion was granted.

In the answer filed, the respondent made claim for the additional deficiency in accordance with the decision of the Board of Tax Appeals.

143 At a hearing on November 8, 1933, respondent's motion for an increased deficiency was allowed, and thereafter, on November 13, 1933, an order of redetermination was entered fixing the amount of the deficiency in petitioner's income tax for the period January 1, 1928, to August 24, 1928, at $72,686.90.

The present petition for review followed in due course.

Several questions are presented by this petition:

1. Whether the transaction heretofore described involving the transfer of assets from the Minnesota Tea Company to the Grand Union Company was a reorganization within section 112 (i) (1) (A) of the Revenue Act of 1928.

2. Whether, even though there was a reorganization, there was a distribution of all the cash received by the Minnesota Tea Company within the meaning of section 112 (d).

3. Whether the procedure before the Board of Tax Appeals in entertaining and allowing the motion for increased deficiency was within the jurisdiction of the Board of Tax Appeals, and was valid.

We turn to the first question.

THE WORDING OF THE STATUTE

Section 112 (i) (1) reads as follows:

"(i) Definition of reorganization.—As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

144 The particular language of the section relied upon by petitioner as showing that there was a reorganization by the transaction between it and the Grand Union Company is "the acquisition by one corporation of * * * substantially all the properties of another corporation." The language is plain and unambiguous. The ascertainment of its meaning is simple.

In Adams Express Co. v. Kentucky, 238 U. S. 190, the Supreme Court said (p. 199):

"It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says."

Such has been the doctrine announced in many cases: United States v. Shreveport Grain & Elev. Co., 287 U. S. 77, 83; Matson Navigation Co. v. United States, 284 U. S. 352, 356; Wilbur v. United States, 284 U. S. 231, 237; Corona Coal Co. v. United States, 263 U. S. 537, 540; United States v. Standard Brewery, Inc., 251 U. S. 210, 217; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 451; Price v. Forrest, 173 U. S. 410, 427; United States v. Goldenberg, 168 U. S. 95, 102.

The doctrine applies with especial force to tax statutes.

In Crooks v. Harrelson, 282 U. S. 55, the court said (p. 61):

"Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In United States v. Merriam, 263 U. S. 179, 187–188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used', we quoted with approval the words of Lord Cairns in Partington v. Attorney-General, L. R. 4 H. L. 100, 122, that 'if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the

law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable con-
145 struction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'"

In Van Camp & Sons v. Am. Can Co., 278 U. S. 245, the Court used the following language (p. 253):

"The words being clear, they are decisive. There is nothing to construe. To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the legislature definitely meant to include."

If the language of the statute cannot be held conclusive of its meaning, let us briefly advert to other considerations.

ADMINISTRATIVE CONSTRUCTION

The language of the statute relative to reorganization upon which petitioner relies is found as far back as the Revenue Act of 1921 (Sec. 202 [c] [2]). It was reenacted by Congress in the Revenue Act of 1924, sec. 203 (h) (1); in the Revenue Act of 1926, sec. 203 (h) (1); and in the Revenue Act of 1928, sec. 112 (i) (1).

Administrative construction, in accord with and recognizing the literal meaning of the words, is to be found in official Regulations: Regulations 65 (1924 act) art. 1574, 1577; Regulations 69 (1926 act) art. 1574, 1577; Regulations 74 (1928 act) art. 574, 577; in published rulings of the Treasury: G. C. M. 3827, VII–2 C. B. 114; G. C. M. 1753, VI–1 C. B. 138; in Decisions of the Board of Tax Appeals: Tulsa Oxygen Co., 18 B. T. A. 1283; National Pipe & Foundry Co., 19 B. T. A. 242, 250; First Nat. Bank of Champlain, 21 B. T. A. 415, 422; Robert D. Green, 24 B. T. A. 719, 725.

This long-continued administrative construction of the language of the definition and the repeated reenactments by Congress without change lead to the application of a well-established principle.

In United States v. Hermanos y Companía, 209 U. S. 337, the Court thus stated the applicable principle of law (p. 339):

"We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon
146 it by the department charged with its execution. Robertson v. Downing, 127 U. S. 607; United States v. Healey, 160 U. S. 136. And we have decided that the reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. United States v. Falk, 204 U. S. 143, 152."

See also Old Mission Portland Cement Co. v. Helvering, 79 L. Ed. 170; Helvering v. Bliss, 293 U. S. 144; Zellerbach Paper Co. v. Helvering, 293 U. S. 172, 178; United States v. Dakota-Montana Oil Co.,

288 U. S. 459; Mass., etc., Ins. Co. v. United States, 288 U. S. 269; Old Colony R. Co. v. Commissioner, 284 U. S. 552; Poe v. Seaborn, 282 U. S. 101; Wisconsin v. Illinois, 278 U. S. 367, 413; National Lead Co. v. United States, 252 U. S. 140; Logan v. Davis, 233 U. S. 613; Edward's Lessee v. Darby, 12 Wheat. 206.

INTENT AND PURPOSE OF CONGRESS

We do not find anything in the surrounding circumstances attendant upon the enactment of sec. 202 (c) (2) of the Revenue Act of 1921 defining "reorganization" which indicates that Congress was not well informed on the subject matter of the enactment.

"Reorganization" tax problems were not new at that time. Cases had arisen under the Revenue Acts of 1909, 1913, and 1916. The Congressional Records show that Congress had the benefit of the knowledge and experience of the Treasury Department in the preparation of the 1921 Revenue Act.

The language relied upon by petitioner in the case at bar, heretofore quoted, and placed in the Revenue Act of 1921, has been continued in the Revenue Acts of 1924, 1926, and 1928. Clause (B) in section 112 (i) (1) of the Revenue Act of 1928 first appeared in section 203 (h) (1) of the Revenue Act of 1924. We find no indication that clause (B) was intended as a modification of clause (A) or any part thereof. On the contrary, what clause (B) was intended to accomplish and did accomplish was to add a further group of cases to the definition of "reorganization."

The Ways and Means Committee explained the addition of clause (B) in the following language (H. Rept. No. 179, 68th Congress, 1st session, p. 16):

147 "Section 203 (h):

"(1) Subdivision (h) (1) contains a definition of reorganization which corresponds to the definition contained in section 202 (c) (2) of the existing law. The only change in the definition is to include within its terms the case of a transfer by a corporation of all or a part of its assets to another corporation, if immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets are transferred. This is a common type of reorganization, and clearly should be included within the reorganization provisions of the statute."

It is significant that Congress in 1924 did not merely amend clause (A). It retained clause (A) as it was in the Revenue Act of 1921 and specifically added a new clause covering a different group of cases, clause (B).

This same view has been taken by the Bureau of Internal Revenue. In G. C. M. 1753, VI–1 C. B. 138, the general counsel for that Bureau said (in 1927):

"Section 203 (h) (1) (A) is not inconsistent with section 203 (h) (1) (B). One supplements the other. For example, a transfer of all the assets of a corporation constitutes a reorganization under

the second part of definition (A), irrespective of the element of 80-percent control demanded by definition (B). Again, a transfer of but a part of the assets of a corporation can never, of itself, result in a reorganization under section 203 (h) (1) (A), but it does result in a reorganization under section 203 (h) (1) (B) if there is present an additional element, namely, immediate control of the transferee corporation by the transferor or its stockholders, or both."

A similar view has recently been taken by the Circuit Court of Appeals for the Fourth Circuit in the case of C. H. Mead Coal Co. v. Commissioner, 72 F. (2d) 22, the court saying (p. 27):

"The taxpayer's contention in this court is founded upon the view that the case involves no more than a transfer by a corporation of all of its property to another corporation, within the meaning of clause (B) of section 203 (h) (1), and that since neither the
148 old companies nor their stockholders retained control of the new corporation, there was no reorganization within the meaning of the section. It is urged in support of this view that the parenthetical words of clause (A), 'including the acquisition by one corporation of * * * substantially all the properties of another corporation', may not be read so broadly in respect to the acquisition of property for stock as to nullify clause (B) dealing with the transfer of property for stock. And it is said that we are here concerned with a transfer of property within clause (B) rather than an acquisition of property in a transaction partaking of the nature of a merger or consolidation, because the property was sold under foreclosure at the insistence of the mortgagee, and not by voluntary act of the stockholders, even though the plan for refinancing the enterprise emanated from them.

"Insofar as this argument suggests that clause (B) of section 203 (h) (1) modifies or restricts the application of clause (A), we think it has been definitely repudiated by the Supreme Court." (Citing Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U. S. 462, 469.)

The court further said (p. 29):

"* * * we reach the conclusion that the provisions of clause (A) of the section are to be given their normal meaning and are not restricted by the subsequent provisions of clause (B) so as to make it necessary that in the case of a merger or consolidation, in which there is an acquisition by one corporation of substantially all the properties of another corporation, there must also be a control in the new corporation by the old corporation, or its stockholders, to the extent of the ownership of 80 per cent of the voting stock."

See also Watts v. Commissioner (CCA 2), opinion filed March —, 1935.

But the Board of Tax Appeals, in its majority opinion in the case at bar, has taken a different view. In effect, the majority opinion modifies the last portion of clause (A) reading: "or substantially all the properties of another corporation", by adding thereto the condition borrowed from clause (B) and reading: "if imme-

diately after the transfer, the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."

We do not think such limitation of the language in clause (A) is permissible. The restriction on clause (A) thus made by the Board of Tax Appeals is sought to be justified by the decisions in the cases of Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U. S. 462, and Cortland Specialty Co. v. Commissioner, 60 F. (2d) 937. We do not think the cases cited justify the conclusion reached in the majority opinion of the Board of Tax Appeals.

In both the Pinellas Ice case and the Cortland Specialty case, the exchange was of property for cash and short-time notes. The real question was whether these short-time notes could be considered as securities. In the Courts of Appeals it was held in both cases that the short-time notes could not be considered as securities within the provisions of section 203 (b) (3) and (e) of the Revenue Act of 1926. The opinions in both cases contained discussions as to meaning of the word "reorganization" as used in the statute.

The Pinellas Ice case went to the Supreme Court and was there affirmed; but the Supreme Court in its discussion of the meaning of the word "reorganization" disapproved the definition of the word given by the Circuit Court of Appeals as being too narrow, and cited with approval the conclusion reached by the Circuit Court of Appeals for the Second Circuit in the Courtland Specialty case.

But in no one of the three discussions do we find support for the holding of the Board of Tax Appeals in the case at bar. Tersely the Supreme Court in the Pinellas Ice case said (p. 470):

"Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes."

Furthermore, we think that the broad general purposes of Congress, to favor business transactions including exchanges and sales of assets; to make the statutes more definite, certain, and specific; to reduce the necessity of litigation; to plan for deferments of taxes rather than exemptions, and to disallow technical losses; to rely upon the provisions of section 113 (Revenue Act of 1928) to prevent misuse of the gain and loss provisions of section 112—point to the construction of the statute which we have above indicated.

The Board of Tax Appeals apparently thought that the intent of Congress required that there should be in a reorganization a continuance of the same actual ownership of substantially the same properties.

We find nothing in clause (A) about the necessity for a continuing interest. That requisite is found as an implication from the provisions of section 112 (b) (3) and (b) (4) relative to the consideration consisting solely of stocks and securities. But those provisions are to be read in connection with section 112 (d). No par-

ticular percentage of the stock of the transferee to be received by the transferor is specified or required. We find no ground for holding that the "continuance of interest" must be of essentially the same interest, or that it must be a controlling interest. The provision for percentage of stock to be received, specified in clause (B) reorganizations, has no application here.

Nor was dissolution required on the part of the petitioner. It would seem that section 112 (g) expressly recognizes that no dissolution is necessary. Dissolution has not been required since 1922 by the administrative construction of the statute or by the courts. G. C. M. 3291, VII-1 C. B. 208; Pinellas Ice & Cold Storage Co. v. Commissioner, supra; C. H. Mead Coal Co. v. Commissioner, supra.

We hold that the transaction between petitioner and the Grand Union Company was a reorganization within the meaning of the language used in section 112 (i) (1) (A) of the Revenue Act of 1928, reading as follows: "the acquisition by one corporation of * * * substantially all the properties of another corporation."

In view of our holding on the first question presented, we do not find it necessary to consider and determine the third question. We have assumed, but without deciding, that the procedure was regular.

Nor do we think it advisable to pass upon the second question in the absence of a ruling on the merits thereof by the Board of Tax Appeals.

151 The petition for review is granted, the order of redetermination of the Board of Tax Appeals is reversed, and the cause is remanded with instructions for further proceedings not inconsistent with the foregoing opinion.

Dissenting opinion

WOODROUGH, Circuit Judge, dissenting.

The controlling facts in this case are very simple. The Minnesota Tea Company had negotiations for the sale of its stock of merchandise, its receivables, and the good will of its business at a price sufficient to make it a profit of more than seven hundred thousand dollars above the statutory cost of the items, and it decided to make the sale. It evidenced its decision on July 2, 1928, by giving its option contract to sell the property specified, expressly excluding its buildings, fixtures, and real estate, which the purchaser apparently did not want. The option was amended in particulars not material here, and having been duly exercised, a sale was consummated in conformity with it as of the date of August 4, 1928. The sum of $426,842.52 was paid in cash, being $172,195.90 more than the statutory cost to the Tea Company. In addition, the Tea Company received 18,000 shares of the common stock of the purchaser, the Grand Union Company, then being sold on the New York Stock Exchange for around 30, and so worth $540,000.00. There was an agreement

that the Tea Company would not dispose of the Grand Union Company stock within a year.

Instead of reporting and paying tax on the seven hundred thousand dollar profit which it derived from the sale, the Tea Company has claimed the whole profit to be exempt, because, it says, the transaction was a reorganization within the purview of section 112 of the Revenue Act of 1912. Its claim is: (1) That there was an acquisition by the Grand Union Company of all the properties of the Tea Company; and (2) The Tea Company took some of the purchase price in stock of the purchaser and because those two elements were present in the transaction there was a reorganization and its gains are exempt from taxation.

(1) In order to make it appear that there was "the acquisition by one corporation of * * * substantially all the properties of another corporation" according to the wording of the statute, the Tea Company went through the following forms of operation
152 after it had given its option contract covering the part of its property that its purchaser wanted (the items are detailed in the record, filling fifty pages). It proceeded to organize a corporation called "the Peterson Investment Company" and transferred to that corporation all its buildings and real estate and every other one of its assets which the purchaser was not buying in the sale—the purchaser agreeing to rent some of the real estate but not to buy any of it.

The stock of the new corporation was issued to the stockholders of the Tea Company and so no real change of beneficial ownership in any propery was occasioned, but when all the assets which the Tea Company had not agreed to sell were by this device gotten out of its hands the Tea Company deemed itself in position to assert its claim that the sale it was making was a sale of all its property; that the transaction was one in which there was "acquisition by one corporation of substantially all the property of another."

I think the disguising of the true nature of the sale by this procedure is exactly the same in principle as that considered and exploded by the Supreme Court and the Circuit Court of Appeals of the Second Circuit in the case of Gregory (cited Helvering v. Gregory, 69 F. (2d) 809; Gregory v. Helvering, — U. S. —, decided Jan. 7, 1935.) In that case there was a chance to sell certain assets belonging to a corporation of which the taxpayer was the sole owner; but if the corporation had turned the assets over to the taxpayer so that she could sell them, or if the corporation had sold the assets and given the taxpayer the money, in either event there would have been a surtax to pay on the dividend. Accordingly, a new corporation was organized, to which the specified assets were transferred, and the stock of the new company was issued to the taxpayer. The taxpayer said that the transaction was a reorganization because there was "a transfer by a corporation of * * * a part of its assets to another corporation" in such circumstances that immediately thereafter "the transferor or its stockholders * * * are in control of the corporation to

which the assets are transferred." She said that since the transaction was a reorganization, her gain (i. e., the stock she received in the new corporation) should not be recognized, because the stock of
153 the new corporation was "distributed in pursuance of a plan of reorganization." The new corporation distributed the specified assets to the taxpayer as a liquidating dividend and then went out of business and the taxpayer thought she had evaded the tax on the dividend.

The Circuit Court of Appeals held that even though the facts answered the dictionary definitions of each term used in the statutory definition, there was not presented what the statute means by "reorganization", because the transactions were no part of the conduct of the business of either or both companies; so viewed they were a sham. The Supreme Court said:

"It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision [sec. 112 i (1) (B)] is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted United States v. Isham, 17 Wall. 496, 506; Superior Oil Co. v. Mississippi, 280 U. S. 390, 395–6; Jones v. Helvering, 71 Fed. (2d) 214, 217. But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below in justification of a negative answer leaves little to be said.

"When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made 'in pursuance of a plan of reorganization' [sec. 112 (g)] or corporate business, and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here. Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was
154 the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt a new and valid corporation was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. When that limited function had been exercised it immediately was put to death.

"In these circumstances the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."

So in this case there is nothing to indicate that the organization of the Peterson Investment Company and the transfer to it of the Tea Company's property had anything to do with the corporate business of the Tea Company. It appears to have been simply a contrivance to enable the Tea Company to simulate a transfer of all its property when, in fact, the actual transaction had with its purchaser did not relate to all the Tea Company's property. In substance that transaction was a sale of part of its property—a taxable transaction—and the nature of the transaction could not be changed by the creation of another corporation merely to hold that part of the taxpayer's property which was not sold.

In the case of Gregory, supra, the corporation owning property transferred the part of its property intended to be sold to the corporation created for the purpose. In this case the corporation keeps the property intended to be sold and transfers the rest to a corporation created for the purpose of holding it. The principle applicable to each transaction is the same. The operations are equally artifices, and nothing more. Realities must control—not artifices.

155 (2) But what was done in this case was not reorganization, even if there had been an acquisition by the one corporation of substantially all the property of the other—which there was not. The substance of the taxpayer's claim is that its sale became a reorganization because it took some of the purchaser's stock in part payment of the purchase price. The point is important, because to sustain the contention would practically destroy the income tax on gains from sale of capital assets. Whatever the canons may be of construction, certainly the main one is not to construe so as to destroy. If it is the law, it would be folly to close any large sale without including some of the purchaser's stock in the purchase price, especially as in this case, where the purchaser's stock was for sale on the New York Stock Exchange. Though the tax on gains from sales is not repealed, none but the simple would need to pay it. But the able majority opinion of the Board of Tax Appeals demonstrates to my mind that it is not the law, and the decisions of the Circuit Courts of Appeals in West Texas Refining & Development Co. v. Commissioner of Internal Revenue (CCA 10), 68 F. (2d) 77; John A. Nelson Company v. Commissioner of Internal Revenue (CCA 7), — F. (2d) —, decided February 23,

1935; and John J. Watts, Hugh C. Sicard, and Parker Sloane v. Commissioner of Internal Revenue (CCA 2), — F. (2d) —, not yet reported, confirm the Board.

In the case of Cortland Specialty Co. v. Commissioner, 69 F. (2d) 937, the true intent and meaning of the reorganization provision of the revenue law was fully considered by the Court of Appeals of the Second Circuit, and it was shown that it was the purpose of Congress "to relieve those interested in corporations from profit taxes in cases where there was only a change in corporate form in which business was conducted, without an actual realization of gain from an exchange of properties." "In defining 'reorganization', section 203 (now 212) of the revenue act gives the widest room for all kinds of changes in corporate structure, but does not abandon the primary requisite that there must be some continuance of interest on the part of the transferor corporation or its stockholders in order to secure exemption. Reorganization presupposes continuance of business under modified corporate forms."

156 The Supreme Court, in Pinellas Ice Co. v. Commissioner, 287 U. S. 462, p. 470, says that its general view (of the true meaning and intent of the statute) is adopted and well sustained in the Cortland case, and it seems to me that declaration is conclusive against the claim for exemption in this case. The transaction of the Tea Company shown by the record in this case was simply a selling out of some of its property at a profit, and nothing else. Nothing indicates that the stock of the purchaser which it took on the sale as part of the purchase price was taken as a means of continuing its interest in the tea business. It only got 7½% of the outstanding stock of the Grand Union Company and it quit the tea business and took its gains in money and in stock which was equivalent to money, and which it was free to turn into money at the end of the year. To call the transaction anything other than a sale is to ignore the reality.

It is clear to my mind that the taxpayer owes the government some seventy-odd thousands of dollars of income tax; that the forms it went through did not affect the substance of the transaction or its liability; and that the decision of the Board of Tax Appeals ought to be affirmed.

157 In United States Circuit Court of Appeals, Eighth Circuit

No. 10031

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

Decree

March 25, 1935

On petition to review decision of United States Board of Tax Appeal

This cause came on to be heard on the petition for review of a decision of the United States Board of Tax Appeals which redetermined a deficiency in the income tax of the petitioner for the period of January 1, 1928, to August 24, 1928, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the said petition for review in this cause, be, and the same is hereby, granted, and that the order of redetermination of said Board of Tax Appeals be, and it is hereby, reversed, without the taxation of costs in favor of either of the parties in this court.

And it is further ordered by this court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals with instructions for further proceedings not inconsistent with the opinion of this court.

March 25, 1935.

158 [Clerk's certificate to foregoing transcript omitted in printing.]

159 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 61.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover]: File No. 39,728. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 174. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Minnesota Tea Company. Petition for a writ of certiorari and exhibit thereto. Filed June 25, 1935. Term No. 174 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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143938—35——1

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

MINNESOTA TEA COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cause on March 25, 1935.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 99–109) is reported in 28 B. T. A. 591. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 797.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 25, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the definition of the term "reorganization" contained in clause (A) of Section 112 (i) (1) of the Revenue Act of 1928 should be limited to transactions which partake of the nature of mergers or consolidations.

2. Whether the statute may be availed of where it appears that preparatory to the transfer in question the taxpayer divested itself of certain assets and that only as thus reduced was there a transfer of "substantially all" of its property.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved will be found in the Appendix, *infra*, pp. 13–16.

STATEMENT

The facts, as stipulated before the Board of Tax Appeals (R. 13–16), are substantially as follows:

The respondent is a Minnesota corporation, with principal office at 2023 West Superior Street, Duluth, Minnesota, and was, until the transfer of its assets hereinafter mentioned, engaged in the business of selling teas, coffees, and groceries at retail. (R. 14.)

On July 14, 1928, the respondent formed, or caused to be formed, the Peterson Investment Company, a corporation, and transferred thereto certain of its assets in exchange for the entire capital stock of Peterson Investment Company. The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments, and other miscellaneous assets. Immediately upon receipt of the stock of Peterson Investment Company it was distributed by respondent *pro rata* among its stockholders. On August 23, 1928, respondent transferred all of its remaining assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of common stock of said Grand Union Company, plus $426,842.52 in cash. (R. 14.)

The transfer effected was accomplished in accordance with the following plan (R. 14; R. 19–25, Ex. B):

On July 2, 1928, the respondent's officers granted an irrevocable option to O. B. Westphal (who was acting as agent for Grand Union Company), to acquire the respondent's inventories, bills, notes, and accounts receivable, furnishings and equipment, and good will in exchange for Voting Trust Certificates for 18,000 shares of common stock of the Grand Union Company, plus $400,000 in cash, plus or minus the difference between the value of the assets at the date of conveyance and the value

on December 31, 1927. Under this option, if exercised, the respondent obligated itself to sell, and the Grand Union Company to buy, the above-described assets. (R. 14.)

On July 6, 1928, the option of July 2, 1928, was accepted. (R. 14.)

On July 24, 1928, an agreement, supplemental to the option of July 2, 1928, was accomplished, fixing August 25, 1928, as the delivery date and providing, for convenience, that the valuation date of the assets should be August 4, 1928, instead of the delivery date. (R. 14; R. 29, Ex. D.)

On August 22, 1928, the stockholders of the respondent adopted a resolution (1) ratifying the action of the respondent's officers in signing the option of July 2, 1928, and the agreement of July 24, 1928; (2) authorizing the sale and transfer of all its assets upon the terms stipulated in the option and modifying agreement, or upon such other terms as the directors might deem advisable; and (3) providing that the corporate stock to be received in exchange should be retained by the respondent and that the cash to be received in exchange should be immediately distributed to the respondent's stockholders in proportion to their respective stockholdings. (R. 14; R. 16–19, Ex. A.)

On August 23, 1928, the stockholders of the respondent adopted a resolution authorizing the officers to execute and deliver a bill of sale and instrument transferring the property to the Grand Union Company. (R. 15; R. 32, Ex. E.)

Upon receipt of the cash and stock, the respondent immediately paid the entire sum of $426,842.52 to its stockholders in proportion to their stockholdings, and the stockholders agreed to pay the corporate debts. (R. 15.)

Under the option, resolution, bill of sale, and all the agreements whereby the transfer of respondent's assets to the Grand Union Company for cash and stock of the latter was accomplished, the transaction is described as one of purchase and sale; the respondent being described as the "seller", and the Grand Union Company, or its agent, "the buyer". (R. 16, 20, 26, 30, 36.)

The amount of the liabilities of the respondent at August 23, 1928, which were assumed and discharged by the stockholders of respondent, pursuant to corporate resolution, was $106,471.73. (R. 15.)

Petitioner, in determining the proposed deficiency herein, added to respondent's taxable income an amount of $106,471.73, representing an alleged profit realized upon the above transfer of assets to the Grand Union Company. (R. 15.) If the said amount of $106,471.73 so added by the petitioner to respondent's taxable income be excluded therefrom, respondent sustained a net loss for the year 1928, in the event the transaction involved constituted a statutory reorganization. (R. 16.)

The matter was thereupon brought before the Board of Tax Appeals for review, upon the issue

of whether or not the respondent realized a taxable gain of $106,471.73, as a result of the transactions above set forth. (R. 4–5.) The petitioner and respondent proceeded on the assumption that a statutory reorganization had been effected. (R. 116.) The Board of Tax Appeals, of its own motion, raised the question as to whether such statutory reorganization had been effected,[1] and in its decision held that there was no reorganization, and that the respondent realized a gain measured by the difference between $254,646.62, the cost of its property, and $966,842.52 (being the sum of $426,842.52 cash and $540,000, the value of 18,000 shares of Grand Union Company), and held that this gain of $712,195.90 was taxable. (R. 100–106.) The Circuit Court of Appeals reversed the Board, holding that the transaction was a reorganization.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

In failing to limit the definition of "reorganization" contained in clause (A) of Section 112 (i) (1) of the Revenue Act of 1928 to transactions which partake of the nature of a merger or consolidation.

[1] In this connection, the Board of Tax Appeals gave both counsel opportunity to brief fully the question of whether or not there had been a statutory reorganization. Counsel for the respondent accordingly submitted a brief thereon prior to the promulgation of the Board's opinion. (R. 116, 125.) This statement is due the Board of Tax Appeals in order that it may appear that its decision was not reached without affording the parties a full opportunity to be heard.

2. In giving effect to an administrative construction which is inconsistent with the statute.

3. In failing to hold that the transaction here involved was not a reorganization within the meaning of the Revenue Acts.

4. In failing to take into account the fact that the respondent had made an anticipatory transfer of the portion of its assets not desired by the Grand Union Company, and hence that the transfer to the Grand Union Company was not a substantial compliance with the statutory requirement that "substantially all" of the property be transferred.

5. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with *C. H. Mead Coal Co.* v. *Commissioner,* 72 F. (2d) 22 (C. C. A. 4th); *John A. Nelson Co.* v. *Commissioner,* 75 F. (2d) 696 (C. C. A. 7th), now pending before this Court on petition for certiorari, No. 61, October Term, 1935, and *G & K Mfg. Co.* v. *Commissioner,* 76 F. (2d) 454 (C. C. A. 4th). These decisions hold that the parenthetical language found in clause (A) of Section 112 (i) (1) of the Revenue Act of 1928 (*infra,* p. 14), namely;

> The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of * * * substantially all the properties of another corporation) * * *

should be limited to transactions which partake of the nature of mergers or consolidations. This construction is consistent with the decision of this Court in *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462, where it was said (pp. 469–470):

> The words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. * * *

However, the court below in the present case gave no consideration to whether the transaction partook of the nature of a merger or consolidation, holding that the transaction satisfied the literal language of the statute, that the stock represented a continuity of interest, and that the statute required nothing more.

The definition in clause (A) had its origin in Section 202 (c) (2) of the Revenue Act of 1921 (c. 136, 42 Stat. 227) and was reenacted in the Revenue Acts of 1924 (c. 234, 43 Stat. 253), 1926 (c. 27, 44 Stat. 9), and 1928[2] (*infra*, p. 14). However, the Revenue Act of 1924 contained an additional defi-

[2] Section 203 (h) (1), Revenue Acts of 1924 (U. S. C., Title 26, Sec. 934) and 1926 (U. S. C. App., Title 26, Sec. 934); Section 112 (i) (1), Revenue Act of 1928 (*infra*).

nition, which now appears as clause (B) of Section 112 (i) (1) of the Revenue Act of 1928 (*infra*), namely:

> a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred * * *

"Control" is defined in Section 112 (j) as the ownership of at least 80 per centum of the total number of shares, including at least 80 per centum of the voting stock. Since clause (A) already defined as a reorganization the acquisition of substantially all the properties of another corporation, and did not require that the transferor should have control of the transferee, the additional definition in clause (B) clearly overlaps clause (A) if the clause (A) definition is literally applied. The legislative history of clause (B)[1] shows that it was intended to include transactions not already provided for by clause (A), and it is therefore apparent that the two definitions were intended to be mutually exclusive and that they should be applied to achieve that result.

It is true that the administrative officers have recognized a transaction such as is here involved as satisfying the statute. This administrative prac-

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[1] H. Rep. No. 179, 68th Cong., 1st Sess., p. 16; S. Rep. No. 398, 68th Cong., 1st Sess., p. 17.

tice, adopted when there was but one applicable definition, was continued after Congress had clearly required that in the case of some reorganizations accomplished by the transfer of corporate assets the transferor must acquire a stock control of the transferee. We submit that this was a mistaken construction which gave no heed to the necessity of correlating the clause (A) definition with the clause (B) definition.

By limiting the clause (A) definition to transactions which partake of the nature of mergers or consolidations, there will be room for the exclusive application of both clause (A) and clause (B); the clause (B) definition will cover transactions not already provided for when it was first introduced into the statute; the Congressional purpose to enlarge the scope of the original definition will be satisfied and the anomalous situation will be avoided of having two applicable definitions with different requirements.

We do not contend, as suggested by the court below, that the requirement of control, found in clause (B), is to be incorporated in clause (A). That would only accomplish a further overlapping. Our position is that transactions which partake of the nature of mergers or consolidations may be treated as reorganizations (assuming that they comply with other requirements) without regard to the stock-control requirement of clause (B).

2. The dissenting opinion below not only approved the reasoning of the Board of Tax Appeals

but advanced as a separate ground for sustaining its decision that the transfer by the respondent to the Grand Union Company did not consist of substantially all of respondent's property. It clearly appears that preparatory to this transfer respondent had divested itself of other property by a transfer to a newly organized corporation, in exchange for the entire capital stock of the latter, which respondent immediately distributed to its own stockholders. The Board found (R. 101) that "Thus reduced, the entire assets * * * were transferred to the Grand Union Co." The transfer to the newly organized corporation (R. 14) embraced the assets not desired by the Grand Union Company (R. 20) and which would otherwise have been retained by the respondent. It does not appear that without the prior transfer respondent would have had a basis for the contention that substantially all of its assets were transferred to the Grand Union Company. The statute may not be availed of to exempt the gain from an "elaborate and devious form of conveyance masquerading as a corporate reorganization" (*Gregory* v. *Helvering*, 293 U. S. 465, 470), and in this view the decision below may be fairly said also to be in conflict with the cited case.

3. The reorganization statutes have given rise to much litigation. This case involves the statutory definition and deals with a basic question which is necessarily presented in all reorganization cases. Its decision will have a wide applica-

tion, not only in cases involving the transfer itself, but also in cases dealing with the question of the proper basis for depreciation and depletion of the property transferred and the basis for gain or loss when the property is disposed of by the transferee. The confusion resulting from the inconsistent administrative practice and the conflicting decisions justifies the intervention of this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JUNE, 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * *

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distrib-

ute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place or organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 74 (promulgated under the Revenue Act of 1928):

ART. 577. *Definitions.*—The term "reorganization," as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—

(1) At least 80 percent of the voting stock, and

(2) At least 80 percent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 174

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

MINNESOTA TEA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 83–90) is reported in 28 B. T. A. 591. The majority and dissenting opinions in the Circuit Court of Appeals are reported in 76 F. (2d) 797. (R. 112–123.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 25, 1935. (R. 124.) The peti-

tion for a writ of certiorari was filed June 25, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the definition of the term "reorganization" contained in clause (A) of Section 112 (i) (1) of the Revenue Act of 1928 should be limited to transactions which partake of the nature of mergers or consolidations.

2. Whether the statute may be availed of where it appears that preparatory to the transfer in question the taxpayer divested itself of certain assets and that only as thus reduced was there a transfer of "substantially all" of its property.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved will be found in Appendix A, *infra*, pp. 36–39.

STATEMENT

The facts, as stipulated before the Board of Tax Appeals (R. 10–12) are substantially as follows:

The respondent is a Minnesota corporation, with principal office at 2023 West Superior Street, Duluth, Minnesota, and was, until the transfer of its assets hereinafter mentioned, engaged in the business of selling teas, coffees, and groceries at retail. (R. 10.)

On July 14, 1928, the respondent formed, or caused to be formed, the Peterson Investment Company, a corporation, and transferred thereto certain of its assets in exchange for the entire capital stock of Peterson Investment Company. The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments, and other miscellaneous assets. Immediately upon receipt of the stock of Peterson Investment Company it was distributed by respondent *pro rata* among its stockholders. On August 23, 1928, respondent transferred all of its remaining assets to Grand Union Company, another corporation, and received in exchange therefor Voting Trust Certificates for 18,000 shares of common stock of said Grand Union Company, plus $426,842.52 in cash. (R. 11, 16, 84.)

The transfer effected was accomplished in accordance with the following plan (R. 11; Ex. B, R. 15–20):

On July 2, 1928, the respondent's officers granted an irrevocable option to O. B. Westphal (who was acting as agent for Grand Union Company), to acquire the respondent's inventories, bills, notes, and accounts receivable, furnishings and equipment, and good will in exchange for Voting Trust Certificates for 18,000 shares of common stock of the Grand Union Company, plus $400,000 in cash, plus or minus the difference between the value of the assets at the date of conveyance and the value

on December 31, 1927. Under this option, if exercised, the respondent obligated itself to sell, and the Grand Union Company to buy the above-described assets. (R. 11.) On July 6, 1928, the option of July 2, 1928, was accepted. (R. 11.) On July 24, 1928, an agreement, supplemental to the option of July 2, 1928, was accomplished, fixing August 25, 1928, as the delivery date and providing, for convenience, that the valuation date of the assets should be August 4, 1928, instead of the delivery date. (R. 11; Ex. D, R. 24–25.)

On August 22, 1928, the stockholders of the respondent adopted a resolution (1) ratifying the action of the respondent's officers in signing the option of July 2, 1928, and the agreement of July 24, 1928; (2) authorizing the sale and transfer of all its assets upon the terms stipulated in the option and modifying agreement, or upon such other terms as the directors might deem advisable; and (3) providing that the corporate stock to be received in exchange should be retained by the respondent and that the cash to be received in exchange should be immediately distributed to the respondent's stockholders in proportion to their respective stockholdings. (R. 11; Ex. A, R. 12–15.)

On August 23, 1928, the stockholders of the respondent adopted a resolution authorizing the officers to execute and deliver a bill of sale and instrument transferring the property to the Grand Union Company. (R. 11–12; Ex. E, R. 25–26.)

Upon receipt of the cash and stock, the respondent immediately paid the entire sum of $426,842.52 to its stockholders in proportion to their stockholdings, and the stockholders agreed to pay the corporate debts. (R. 11–12.) The amount of the liabilities of the respondent on August 23, 1928, which was assumed and discharged by its stockholders, pursuant to the resolution, was $106,471.73. (R. 12.)

Under the option, resolution, bill of sale, and all the agreements whereby the transfer of respondent's assets to the Grand Union Company for cash and stock of the latter was accomplished, the transaction is described as one of purchase and sale; the respondent being described as the "seller", and the Grand Union Company, or its agent, "the buyer." (R. 12, 15, 20, 24, 28.)

Petitioner, in determining the proposed deficiency herein, added to respondent's taxable income for 1928 an amount of $106,471.73, representing an alleged profit realized upon the above transfer of assets to the Grand Union Company. (R. 12.) If the said amount of $106,471.73 so added by the petitioner to respondent's taxable income be excluded therefrom, and if the transaction above described constituted a statutory reorganization, respondent sustained a net loss for the year. (R. 12.)

The matter was brought before the Board of Tax Appeals for review upon the issue of whether or

not the respondent realized a taxable gain of $106,471.73 as a result of the transactions above set forth (R. 3–4), both petitioner and respondent proceeding on the assumption that a statutory reorganization had been effected. (R. 97.) The Board of Tax Appeals, of its own motion, raised the question as to whether such statutory reorganization had been effected,[1] and in its decision held that there was no reorganization, and that the respondent realized a gain measured by the difference between $254,646.62, the cost of its property, and $966,842.52 (being the sum of $426,842.52 cash and $540,000, the value of 18,000 shares of Grand Union Company), and held that this gain of $712,195.90 was taxable. (R. 83–88.) The Circuit Court of Appeals reversed the Board, holding that the transaction was a reorganization. (R. 112–119.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to limit the definition of "reorganization" contained in clause (A) of Section 112 (i) (1) of the Revenue Act of 1928 to transactions

[1] In this connection, the Board of Tax Appeals gave both counsel opportunity to brief fully the question of whether or not there had been a statutory reorganization. Counsel for the respondent accordingly submitted a brief thereon prior to the promulgation of the Board's opinion. (R. 97, 103–104.) This statement is due the Board of Tax Appeals in order that it may appear that its decision was not reached without affording the parties a full opportunity to be heard.

which partake of the nature of a merger or consolidation.

2. In giving effect to an administrative construction which is inconsistent with the statute.

3. In failing to hold that the transaction here involved was not a reorganization within the meaning of the Revenue Acts.

4. In failing to take into account the fact that the respondent had made an anticipatory transfer of the portion of its assets not desired by the Grand Union Company, and hence that the transfer to the Grand Union Company was not a substantial compliance with the statutory requirement that "substantially all" of the property be transferred.

5. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

The statute contains two definitions of a reorganization accomplished by the transfer of assets from one corporation to another. One (clause (B)) requires that the transferor shall be in control of the transferee after the transfer. The other (clause (A)) has no such condition, but it is a part of a parenthetical clause added to "merger or consolidation." These clauses have separate legislative histories and are obviously intended to be mutually exclusive. These circumstances admit of no doubt that the clause (A) definition must be restricted in order to avoid rendering nugatory the condition of the clause (B) definition. This Court has already

indicated that the appropriate restriction is to confine the clause (A) definition to transactions which partake of the nature of mergers or consolidations.

The transaction here involved fails to conform substantially to certain basic elements found in mergers and consolidations. It resulted in a substantial change in the relation of the taxpayer to its former assets, and neither the taxpayer nor its stockholders acquired a voice in the new management. A large proportion of cash entered into the transaction. The transaction has many attributes of a sale and we submit that it did not partake of the nature of a merger or consolidation.

Prior to the transfer of assets to the Grand Union Company the taxpayer divested itself of certain assets which the Grand Union Company was not to acquire. Only as thus reduced is there any basis for the contention that substantially all of the assets were transferred. We submit that such an anticipatory transfer should be treated as a step in a single transaction and that the purpose of Congress to require a transfer of "substantially all" the assets may not thus be defeated.

ARGUMENT

I

THE STATUTE CONTAINS TWO OVERLAPPING DEFINITIONS OF REORGANIZATION. THEY CAN BE RECONCILED ONLY BY RESTRICTING THE CLAUSE (A) DEFINITION TO TRANSACTIONS WHICH RESULT IN MERGERS OR CONSOLIDATIONS OR PARTAKE OF THEIR NATURE.

As a general rule gains upon exchanges of property are taxable. Section 112 (a) of the Revenue Act of 1928 (Appendix A, *infra*, p. 36) in terms so declares, "except as hereinafter provided in this section." The transaction here involved was a disposition of property which admittedly produced a profit. There is no controversy with respect to the amount of the profit, the sole question being whether the respondent is freed from taxation on it by the exceptions contained in other provisions of Section 112. It is, of course, well settled that one claiming an exemption from tax must bring himself squarely within the provisions of the statute under which he claims such exemption. The rule is equally applicable to a taxpayer who claims the benefit of exceptional treatment. *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182, 187.

The exemption on which the taxpayer relies is contained in Section 112 (b) (4) as modified by Section 112 (d) (1). Section 112 (b) (4) provides that—

> No gain or loss shall be recognized if a corporation a party to a reorganization ex-

> changes property, in pursuance of the plan of reorganization, *solely for stock or securities in another corporation a party to the reorganization.* (Italics supplied.)

This provision is qualified by Section 112 (d), which provides that money or property other than stock or securities may enter into the transaction, but, if not distributed by the corporation pursuant to the plan of reorganization, shall be taxable to the extent that gain is involved.

The word "reorganization" as used in the section is defined in Section 112 (i), which, so far as applicable here, is as follows:

> (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of • • • substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transferor or its stockholders or both are in control of the corporation to which the assets are transferred • • •.

"Control" is defined in Section 112 (j) as the ownership of at least 80% of all classes of stock, including at least 80% of the voting stock.

Respondent's case depends upon whether the transaction satisfies one of these definitions. It is clearly not within the clause (B) definition because of the absence of the requisite control. Respondent says that Grand Union acquired "substantially all

the properties of another corporation", and hence that clause (A) of the statutory definition literally applies. However, the quoted words do not stand alone in the definition. They constitute a parenthetical clause modifying the words "merger or consolidation", and it is necessary to consider the definition as a whole.

The rule is thus stated in *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 126:

> But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income-tax legislation of which it is an integral part.

The underlying purpose of the statute was to relieve from the tax only those transactions which effect purely formal adjustments in corporate structures. *Cortland Specialty Co.* v. *Commissioner*, 60 F. (2d) 937 (C. C. A. 2nd), certiorari denied, 288 U. S. 599; *West Texas Refining & D. Co.* v. *Commissioner*, 68 F. (2d) 77 (C. C. A. 10th). In the Revenue Act of 1918 (c. 18, 40 Stat. 1057) the first attempt was made to deal with this situation and relieve purely paper profits from taxation. This legislation proved unsatisfactory, and in presenting the reorganization provisions of the Revenue Act of 1921 (c. 136, 42 Stat. 227), the report

of the Senate Finance Committee stated (S. Rep. No. 275, 67th Cong., 1st Sess., p. 11):

> Section 202 (subdivision c) provides new rules for those exchanges or "trades" in which, although a technical "gain" may be realized under the present law, the taxpayer actually realizes no cash profit.

Thus Congress never intended that the reorganization provisions should be extended to sales or other transactions which substantially change the taxpayer's situation. This is now well settled. *Cortland Specialty Co.* v. *Commissioner*, 60 F. (2d) 937 (C. C. A. 2nd), certiorari denied, 288 U. S. 599; *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462; *Prairie Oil & Gas Co.* v. *Motter*, 66 F. (2d) 309 (C. C. A. 10th); *Lonsdale* v. *Commissioner*, 32 F. (2d) 537 (C. C. A. 8th), certiorari denied, 280 U. S. 575. Accordingly, not every acquisition of substantially all the properties of another corporation is within the purview of this statute.

As introduced in the House of Representatives the Revenue Act of 1921 defined the term "reorganization" simply as a merger or consolidation. In the Senate there was added to this definition the case where one corporation acquires at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation. H. Conference Rep. No. 486, 67th Cong., 1st Sess., pp. 17–18. This was the origin of clause (A) of the definition in

Section 112 (i), Revenue Act of 1928. The addition made by the Senate was thrown into parentheses, thus showing that while Congress was extending the definition of "reorganization" so as to include transactions which were not strictly mergers or consolidations, it was nevertheless intended to exclude transactions which were wholly foreign to mergers or consolidations.

This parenthetical definition was considered in *Pinellas Ice Co.* v. *Commissioner, supra,* and this Court said (pp. 469–470):

> The words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation.

We think that this statement marks the limit of the expanded meaning and that the parenthetical language of clause (A) is applicable only where the transaction is closely related to a merger or consolidation. *C. H. Mead Coal Co.* v. *Commissioner,* 72 F. (2d) 22 (C. C. A. 4th); *G. & K. Mfg. Co.* v. *Commissioner,* 76 F. (2d) 454 (C. C. A. 4th), now pending in this Court, No. 187, present term; *John A. Nelson Co.* v. *Commissioner,* 75 F. (2d) 696

(C. C. A. 7th), now pending before this Court, No. 61, present term.

This view finds support in the fact that the next Revenue Act added a definition which covered a transfer of corporate assets by a transaction not partaking of the nature of a merger or consolidation. When Congress reenacted the reorganization provisions in the Revenue Act of 1924 (c. 234, 43 Stat. 253), there was included the additional definition (Section 203 (h) (1) (B).), which appears as clause (B) of Section 112 (i), Revenue Act of 1928 (*infra*, p. 36), viz: a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or its stockholders, or both, are in control of the corporation to which the assets are transferred. When this language was inserted in the Revenue Act of 1924 its purpose was thus explained by the House Committee on Ways and Means (H. Rep. No. 179, 68th Cong., 1st Sess., p. 16):

> Subdivision (h) (1) contains a definition of reorganization which corresponds to the definition contained in section 202 (c) (2) of the existing law. The only change in the definition is to include within its terms the case of a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets

> are transferred. This is a common type of reorganization, and clearly should be included within the reorganization provisions of the statute.

See also S. Rep. No. 398, 68th Cong., 1st Sess., p. 17.

Thus it appears that Congress intended clause (B) to include transactions which were not already provided for by clause (A), and it is also apparent from the legislative history of clause (B) that the two definitions were intended to be mutually exclusive. To achieve that result it is necessary to limit the scope of clause (A). Hence we submit that, as indicated by this Court in the *Pinellas* case, *supra*, it is applicable only to those transactions which approach true mergers or consolidations. This construction leaves to clause (B) the field of transfers of corporate assets which are accomplished by transactions having no resemblance to mergers or consolidations. Clauses (A) and (B) are in this way brought into complete harmony, and the true significance of the parenthetical modification of "merger or consolidation" is given effect. *Minnesota Tea Co.* v. *Commissioner*, 28 B. T. A. 591. (R. 86.)

Moreover, unless this construction be adopted, there is presented the anomalous situation of having two applicable definitions with different requirements, for both clause (A) and clause (B) include transfers of assets from one corporation to another, and clause (B) contains a requirement for

control by the transferor or its stockholders which is omitted in clause (A). It is only by limiting clause (A) to mergers, consolidations, or transactions partaking of their nature that this result can be avoided.

This added requirement of control in clause (B) must be accorded its proper significance. It is definitely established that in order for a transferor to receive the benefit of the statute it must acquire an intimate interest in the affairs of the transferee. *Pinellas Ice Co.* v. *Commissioner, supra.* If the transaction approaches a merger or consolidation, and clause (A) of Section 112 (i) applies, this continuity of interest exists. Hence no minimum stock interest is expressly required in a clause (A) reorganization. Where, however, the transaction does not approach a merger or consolidation, but instead assumes the character of a substantial rather than a formal change, Congress was unwilling to treat it as a reorganization unless, as provided by clause (B), "the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."

Thus Congress has seen fit to make a distinction between the two situations where the transferee takes over the operation of the properties of another corporation (1) by a merger, consolidation, or something akin thereto, or (2) by a transaction unrelated to a merger or consolidation. When

viewed in the light of the general purpose of the statute not to recognize gains or losses arising from transactions involving mere formal changes in the business structure, it is submitted that this distinction is a reasonable one. Certainly it cannot be doubted that where a corporation has divested itself of substantially all of its assets by a sale, its relationship to those assets has undergone a substantial change and for tax purposes the transaction should be regarded as closed. Accordingly, Congress was unwilling to recognize transfers of assets as reorganizations unless they were either (1) accomplished in connection with a merger or consolidation, as expanded by clause (A), or (2) accompanied by an 80% proprietary control of the transferee, and thus came within clause (B).

In view of what has been said above, we regard it as settled that the transactions under clause (A) must partake of the nature of a merger or consolidation. Therefore, it becomes important to inquire what are the elements of a strict merger or consolidation. They were defined in *Cortland Specialty Co.* v. *Commissioner, supra* (p. 939) as follows:

> A merger ordinarily is an absorption by one corporation of the properties and franchises of another whose stock it has acquired. The merged corporation ceases to exist, and the merging corporation alone survives. A consolidation involves a disso-

lution of the companies consolidating and a transfer of corporate assets and franchises to a new company.

We believe it is true that mergers and consolidations embrace the following elements: (1) An agreement between two or more corporations to combine their enterprises. (2) The continued participation of the stockholders of the combining corporations. (3) The assumption by the surviving corporation of the liabilities of the old company (both *ex contractu* and *ex delicto*). (4) The dissolution of some or all of the old companies.

In addition, there are various formal requisites, such as a formal agreement specifying the plan in detail; the specific ratification by a required proportion of the stockholders; recording with a specific State officer and the payment of a fee, etc. It is clear enough that Congress was not concerned with such details as these.

We think that the obvious requirements of the statute follow closely the substantial elements of mergers and consolidations stated above. The statute requires that the transaction be an exchange as distinguished from a sale. The general rule in Section 112 (a) (Appendix A, *infra*, p. 36) applies to a "sale or exchange". But the exception upon which respondent relies (Section 112 (b) (4), Appendix A, *infra*, p. 36) is limited in its application to exchanges.

A plan of reorganization is required and this Court has held it to be essential. *Gregory* v. *Hel-*

vering, 293 U. S. 465. The plan must be a corporate plan between two or more corporations, since Section 112 (b) (4) requires that "a corporation a party to a reorganization" receive for its property "stock or securities in another corporation a party to the reorganization."

A corporation which transfers its assets in pursuance of a plan of reorganization must preserve its interest in the assets transferred. *Pinellas Ice Co.* v. *Commissioner, supra.* Since Section 112 (b) (4) postpones the tax only upon "stock or securities in another corporation a party to the reorganization", it seems logical that the continuity of interest must be evidenced by such stock or securities. So far as the clause (A) transfers are concerned the statute specifies no definite measure of continuity. But it seems clear that it must be the substantial equivalent of the property transferred. This seems to follow from the fundamental purpose of the statute to postpone the ta nly in cases where there is a formal rather th a substantial change. This view is further supported by the fact that the transferee of the corporate assets is required to assume the basis of the transferor for the purpose of depreciation, depletion, and gain or loss upon subsequent dispositions of the property. See Section 113, Revenue Act of 1928. The statutory plan is to defer taxation upon condition that the property exchanged shall continue to be dealt with, for tax purposes, upon the same basis as that

used by the transferor. Thus the transferee is not permitted to "step up" the basis to the value at the time of acquisition or the amount of the consideration paid to the transferor. This plan is perfectly consistent with the application of the reorganization provisions solely to formal changes where the same proprietors are employing the same assets in the same business. Since the transferor corporations and their stockholders are the ones to benefit by the reorganization provisions, it is reasonable to believe that Congress expected that the compensating burden of using the old basis would be borne by them through their proprietary interest in the transferee. It is also significant that Section 112 (b) (4) limits the tax-free property *solely* to stock or securities and that cash or property other than stock or securities is permitted to be received tax free only to the extent that it does not represent gain (Section 112 (d), Appendix A, *infra*, p. 36). Such "other property or money" was referred to in the legislative history[1] as "boot", and it seems clear that Congress expected it to be comparatively insignificant in amount. Accordingly, we submit that the proportion between "stock or securities", on the one hand, and "other property or money", on the other hand, should be subjected to close scrutiny in determining the applicability of the statute.

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[1] H. Rep. No. 179, 68th Cong., 1st Sess., p. 14; S. Rept. No. 398, 68th Cong., 1st Sess., p. 15.

Under earlier acts it was the rule that stockholders realized income upon an exchange of securities even where they represented a different interest in the same business enterprise (*Marr* v. *United States*, 268 U. S. 536, 540), and it seems clear that the reorganization provisions were primarily designed to postpone the tax upon such paper profits. *C. H. Mead Coal Co.* v. *Commissioner, supra* (p. 27). We submit that the Court should be slow to extend the application of the statute to other fields.

With respect to the assumption of liabilities, the general rule is that where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor. But this rule is not applicable where the transaction amounts to a merger or consolidation or where the purchasing corporation is merely a continuation of the selling corporation. *West Texas Refining & D. Co.* v. *Commissioner*, 68 F. (2d) 77; Jones on Insolvent and Failing Corporations, p. 293; *Consol. Gas Co.* v. *Balto. County*, 98 Md. 689; *Mayor and C. C. of Baltimore* v. *Balt. and Ohio R. R. Co.*, 6 Gill (Md.) 288. Since the statute as interpreted by this Court in the *Pinellas* case, *supra*, makes a sharp distinction between sales and reorganizations, and since the statute deals with a combination in which the old proprietors have a continuing interest, it would be reasonable to expect to find the surviving corporation recognizing its liability for all claims attach-

ing to those assets or growing out of their use under the old corporate structure.

With respect to dissolution, it would appear that a combination of enterprises which preserves the requisite continuity of interest would ordinarily result in the dissolution of the old corporation. In this view it would be necessary to define "substantially all the properties", where this language appears in clause (A), as all except the property necessary to the winding up of the old corporation's affairs. We do not contend that the old corporations should immediately dissolve in order that the transaction should partake of the nature of a merger or consolidation. In strict mergers or consolidations they are not always permitted to dissolve immediately (see Connecticut statute referred to in *Arrow-Hart & H. Co.* v. *Comm'n*, 291 U. S. 587), but if there is required a plan of reorganization whereby the old business is to be conducted under a changed corporate structure (*Cortland Specialty Co.* v. *Commissioner, supra*, p. 940), it seems consistent with the scheme of the statute to require that the plan should include the ultimate dissolution of the constituent corporations. *Fordyce* v. *Helvering*, 76 F. (2d) 431 (App. D. C.). The statute does not deal with a mere association of co-existing corporations, but with a continuing business in a new form. If Congress intended to permit the old corporations to remain alive and hold indefinitely the stock or securities evidencing

a continuation of interest, it has encouraged, as tax-free, transactions which would result *pro tanto* in eliminating the tax upon corporate dividends to be subsequently paid upon such stock. This result would inevitably follow, because corporations pay no tax upon dividends received from other domestic corporations. Section 23 (p), Revenue Act of 1928. There is no evidence anywhere that Congress intended to be so generous. The legislative history evidences a purpose merely to *defer* the taxation of the gains involved in a reorganization, and it is not to be supposed that in achieving that result Congress was willing to *permanently exempt* from taxation large amounts of corporate dividends.

In view of the above, we think there is a sound basis for the conclusion that clause (A) reorganizations should substantially satisfy the basic elements of mergers and consolidations, but that the formal requisites may be dispensed with.

II

THE TRANSFER TO THE GRAND UNION COMPANY DID NOT SUFFICIENTLY PARTAKE OF THE NATURE OF A MERGER OR CONSOLIDATION TO BE TREATED AS A REORGANIZATION

The transaction here under examination fails in several particulars to satisfy the requirements discussed above: (1) There was no plan of reorganization. (2) Respondent received no stock and the voting-trust certificates gave it no voice in the management. (3) The proportion of cash to stock

interest was so large that respondent's proprietary interest after the transfer was not substantially in proportion to its contribution to the combined business. Therefore, the exchange resulted in a change of substance rather than a change of form. (4) Respondent's liabilities were not assumed by the Grand Union Company. (5) Respondent's stockholders did not become stockholders of the Grand Union Company, nor was it a part of the plan that they should. Respondent itself held the Grand Union voting trust certificates. (6) Respondent did not dissolve and the plan did not contemplate that it should, nor was there any change whatsoever in its corporate structure.

We shall briefly discuss each of the points enumerated above.

(1) The record is bare of any evidence that the respondent and the Grand Union Company desired to effect a reorganization. Instead of commencing with a plan of reorganization, the negotiations in this case began with an option to purchase. On July 2, 1928, respondent's president and secretary (two of its three stockholders) gave an irrevocable option to O. B. Westphal (R. 15), who was acting on behalf of the Grand Union Company (R. 11). It was an option to purchase, was couched in terms of purchase and sale, and respondent agreed to comply with any applicable Bulk Sales Laws. (R. 20.) The option was accepted by Westphal on July 6, 1928. (R. 11.) On July 24, 1928, a supplemental agreement was entered into (R. 24) "for

the Purchase of Minnesota Tea Company Property." These agreements were ratified by respondent's stockholders at a special meeting on August 22, 1928 (R. 12) as a sale of the company's assets, and the Board of Directors was authorized to accomplish the transaction by bill of sale (R. 14). Also upon August 22, 1928, respondent's Board of Directors met (R. 20), ratified the agreements of July 2, 1928, and July 24, 1928, resolved to sell respondent's assets pursuant to the agreements, and authorized the officers to execute the bill of sale (R. 22). At a meeting of the stockholders on August 23, 1928 (R. 25) the proposed bill of sale was presented and approved. Pursuant to the authority given, respondent's officers transferred the specified assets to the Grand Union Company by bill of sale. (R. 28.) Here, as in the *Pinellas* case, *supra,* the negotiations and the transfer itself were in terms of purchase and sale. There was no purpose to reorganize and the transaction was not carried out pursuant to a plan of reorganization.

In contrast with the minutes authorizing the sale to the Grand Union Company (R. 13) are the minutes of June 18, 1928, authorizing a corporate reorganization by the formation of the Peterson Investment Company and the transfer to it of certain assets in exchange for all of the stock of the Peterson Investment Company (R. 26–27). These resolutions differ radically from those adopted with reference to the Grand Union transaction and indicate clearly that respondent regarded the latter

transaction as a sale and the Peterson transaction as a reorganization.

(2) Although it is stipulated (R. 11) that respondent received 18,000 shares of common stock of the Grand Union Company, this statement is not strictly accurate. The option agreement (R. 16) shows that respondent agreed to receive voting-trust certificates for 18,000 shares of common stock of the Grand Union Company, and the Board of Tax Appeals found that it did receive voting-trust certificates (R. 84). Voting-trust certificates, of course, gave respondent no voice in the management of the business. While the certificates gave respondent a proprietary interest, it was an interest radically different from that theretofore held. Respondent parted with its assets and retained only a right to share in the earnings which they might produce under the new management, but it had no longer even a voice in the management. Under the agreement, respondent's three stockholders became employees of the Grand Union Company. (R. 19.) Accordingly, we submit that the transaction with the Grand Union Company caused a substantial change in the status of both respondent and its stockholders, and that this transaction does not exhibit the change of form rather than of substance to which Congress intended to limit the special consideration provided for by the reorganization provisions.

(3) The 18,000 shares of Grand Union stock represented by the voting trust certificates were val-

ued at $540,000. (R. 88.) In addition respondent received $426,842.52 in cash. (R. 88.) For the reasons set forth above, we submit that such a large proportion of cash is inconsistent with a corporate reorganization which involves merely a formal change. In effect respondent disposed of nearly 50% of its proprietary interest, which is inconsistent with a statute dealing with exchanges solely for stock or securities and permitting cash and other property to be received only as "boot".

(4) The Grand Union Company did not assume any of respondent's liabilities, except contracts for the purchase of goods, and, in addition, contracts for chattels, machinery and equipment entered into with the consent of the Grand Union Company during the option period. (R. 16.) Respondent's stockholders agreed to pay all the corporate debts, whether due or payable, and whether certain or contingent. (R. 14, 23.) As pointed out above, it is one of the indicia of a reorganization, as distinguished from a sale, that the surviving corporation assume the liabilities of the old company.

(5) Respondent's stockholders did not become stockholders of the Grand Union Company. It was a part of the plan that the Minnesota Tea Company continue to own and hold the common stock of the Grand Union Company represented by the voting trust certificates. (R. 14.) As pointed out above, this has the effect of making the dividends nontaxable. The result is that after this transaction re-

spondent reported neither the profits earned by its former assets nor the dividends declared by the new management. The Minnesota Tea Company retained all its corporate powers, made no change in its corporate structure, and the status of its stockholders changed from direct managers of a local tea business to employees of the Grand Union Company. We submit that these changes are substantial and not formal.

(6) The Minnesota Tea Company remained in existence. Before the transaction its business was the selling of teas, coffees, and groceries at retail. (R. 10.) Its agreement with the Grand Union Company specified that it would not thereafter engage in the Wagon Route tea and coffee business in any part of the United States. (R. 19.) Apparently respondent was free to engage in the grocery business and in any business involving the marketing of tea and coffee by other means than Wagon Routes. After the transfer there were two coexisting corporations, with the Minnesota Tea Company holding a 7½% interest in the Grand Union Company. (R. 84.) It is clear, we think, that by the transfer respondent completely changed its former status with respect to the assets transferred to the Grand Union Company and did not continue the conduct of the same business with the same assets under a different corporate form. It was free to compete with the Grand Union Company if such a course had proven advisable. Its corporate exist-

ence was not continued for any temporary purpose connected with the winding up of the business, and no change occurred in its corporate structure.

For these reasons, we think that the transaction was not a reorganization.

The decision of the Circuit Court of Appeals is predicated chiefly upon the wording of the statute (R. 114), the administrative construction (R. 115), and the intent of Congress (R. 116). Insofar as the court relied upon the literal language of the statute, its decision is clearly in conflict with those of this Court in *Pinellas Ice Co.* v. *Commissioner, supra;* and *Gregory* v. *Helvering, supra.*

Nor has the administrative practice, as represented by the Treasury Regulations,[3] been sufficiently specific to support the decision below. The regulations consist largely of a paraphrase of the statutory provisions, but they emphasize that the statute is dealing with corporate reorganizations which result only in a change of form which does not substantially affect the property interests of either the shareholders or the corporations. The examples given in the regulations should be read in the light of this general principle and the cautionary statement that "the statute does not allow the use of reorganizations to avoid the tax". The rule that the contemporaneous interpretation of the statute by the administrative officers charged with

[3] Treasury Regulations 65 and 69, Articles 1574 and 1577; Treasury Regulations 74, Articles 574 and 577.

its enforcement will be given great weight, is not without exception and this Court has power to disregard it. *Fox* v. *Standard Oil Co.*, 294 U. S. 87. So far as the decisions of the Treasury Department applying the regulations are concerned, this Court has declared that they have no more force than the reasons given to sustain them. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1.

The administrative practice failed to give proper effect to the introduction in the Revenue Act of 1924 of the definition in clause (B). Since the 1924 Act clearly required that the transferor retain an 80% control of the transferee in a transfer involving "all or a part" of its assets, it is evident that the clause (A) definition could not be literally applied without rendering that requirement nugatory. Insofar as the administrative practice failed to heed the necessity of correlating the clause (A) definition with the clause (B) definition,* we think it should be disregarded.

The provisions of the law are quite complicated and have proven to be difficult to interpret consistently when applied to actual cases as they arise, although the Treasury has consistently treated the parenthetical clause as enlarging the scope of the definition so as to include transactions which technically are not mergers or consolidations. The Statement of the Acting Secretary of the Treasury regarding the Preliminary Report of a Subcom-

* G. C. M. 1753, VI-1 Cumulative Bulletin 138.

mittee of the Committee on Ways and Means (1933) (Appendix B, *infra*, p. 49) shows some of the difficulties. The Preliminary Report of the Subcommittee of the Committee on Ways and Means, 73d Congress, 2nd Session, to which the Acting Secretary of the Treasury's statement referred, recommended the abolition of the reorganization provisions. However, the provisions were reenacted in the Revenue Act of 1934 with important changes designed to close loopholes in the prior law. Section 112, Revenue Act of 1934, c. 277, 48 Stat. 680.

The court below also failed to appreciate that a literal construction of the clause (A) definition could not be supported after the Revenue Act of 1924 introduced the definition in clause (B). Its reliance upon *C. H. Mead Coal Co.* v. *Commissioner, supra,* is shown to have been misplaced by that court's later decision in *G. & K. Mfg. Co.* v. *Commissioner, supra.* We do not contend, as suggested by the court below, that the requirement of control found in clause (B) is to be incorporated in clause (A). That would only accomplish a further overlapping of the statute. Our position is that transactions which partake of the nature of mergers or consolidations may be treated as reorganizations (provided they comply with other requirements) without regard to the stock control requirement of clause (B). In other words, the important question when dealing with the clause (A) definition is

whether the transaction partakes of the nature of a merger or consolidation, while the important element in the clause (B) definition is the "control" requirement.

Moreover, we think that the purpose of Congress to favor business reorganizations is an inadequate basis for extending the scope of the statute beyond its manifest purpose and for disregarding the limits of the Congressional bounty. Upon this point the decision below overlooks the settled rule that provisions of taxing statutes granting immunity from taxation are to be strictly construed against the taxpayer. *Pacific Co.* v. *Johnson*, 285 U. S. 480, 491. While the theory of the reorganization provisions is that the tax will be deferred only, the result is at least a temporary exemption, and for present purposes the rule of strict construction would seem to apply. The statement of the court below, that there is no ground for holding that the continuance of interest must be of essentially the same interests, overlooks the basic purpose of Congress to disregard merely formal changes. That purpose necessarily colors the construction of all of the reorganization sections and must be treated as a gloss on the definition of reorganizations, as well as on the other provisions. The construction of the statute in *John A. Nelson Co.* v. *Commissioner, supra*, is squarely opposed to the liberal view of the court below.

We submit that the construction of the statute adopted by the court below exposes the statute to manipulation and abuse which can be avoided only by an adherence to the broad principles which actuated Congress in enacting the reorganization provisions, and a limitation of their application to transactions which meticulously comply with all of the specific requirements, as well as those which are implicit in the statute.

III

RESPONDENT DID NOT TRANSFER "SUBSTANTIALLY ALL" ITS ASSETS TO THE GRAND UNION COMPANY IF A PRIOR TRANSFER BE TAKEN INTO ACCOUNT

As pointed out by the dissenting opinion below, there is a separate ground for holding that this transaction does not satisfy the statute. Respondent contends that it transferred substantially all of its property to the Grand Union Company, but it is only by disregarding an anticipatory transfer of a portion of its assets to the Peterson Investment Company that there is any basis for this contention.

The record shows that respondent formed, or caused to be formed, the Peterson Investment Company, a corporation, and transferred thereto certain of its assets in exchange for the entire capital stock of the Peterson Investment Company. This transaction was in pursuance of a resolution adopted by the stockholders at their meeting of

June 18, 1928. (R. 26.) The assets so transferred to the newly formed corporation consisted of real estate and buildings, investments, and other miscellaneous assets (R. 11), which were not to be transferred to the Grand Union Company (R. 16). Some of this real estate was later leased to the Grand Union Company by the Peterson Investment Company. (R. 18.) The Board of Tax Appeals found (R. 84) that "Thus reduced, the entire assets of the Minnesota Co. * * * were transferred to the Grand Union Co. * * *." The prior transfer left respondent with only the assets to be transferred to the Grand Union Company, and it was only by this anticipatory transfer that respondent avoided retaining such assets after the transfer to the Grand Union Company, and avoided becoming itself the landlord of the Grand Union Company in place of the Peterson Investment Company.

We submit that on the principles announced in *Gregory* v. *Helvering*, 293 U. S. 465, 470, this statute may not be literally applied to defeat the manifest purpose of Congress. If such anticipatory transfers are countenanced, the attempt of Congress to limit the benefits of this statute to transfers of "substantially all" the assets of a corporation will be set at naught and the astute taxpayer will be permitted to manipulate the statute to his own advantage.

Since these separate transfers are so evidently related, and are parts of a preconceived plan, this

is a case in which they should be treated as parts of a single transaction. The courts have not hesitated to apply the principle that the substance of a transaction must prevail over the form, and, consequently, to keep in view the entire transaction as a complete unit. *Tulsa Tribune Co.* v. *Commissioner*, 58 F. (2d) 937 (C. C. A. 10th); *Prairie Oil & Gas Co.* v. *Motter*, 66 F. (2d) 309 (C. C. A. 10th); *American Security & Trust Co.* v. *Tait*, 5 Fed. Supp. 337 (Md.).

CONCLUSION

In view of the foregoing, we respectfully submit that the decision of the Circuit Court of Appeals should be reversed.

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NOVEMBER, 1935.

APPENDIX A

REVENUE ACT OF 1928, C. 852, 45 STAT. 791

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(4) *Same—Gain of corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * *

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least

80 per centum of the total number of shares of all other classes of stock of the corporation.

TREASURY REGULATIONS 74 (PROMULGATED UNDER THE REVENUE ACT OF 1928)

ART. 577. *Definitions.*—The term "reorganization," as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—

(1) At least 80 percent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

APPENDIX B

House Committee Print, 73d Congress, 2d Session, Preliminary Report of a Subcommittee of the Committee on Ways and Means, Submitted December 4, 1933, on "Prevention of Tax Avoidance", pp. 8–9, 37–39, 42:

(5) *Exchanges and Reorganizations*

Your subcommittee makes the following recommendations with respect to exchanges and reorganizations:

(a) That the exchange and reorganization provisions contained in section 112 of existing law be abolished;

(b) That in cases where the immediate payment of the tax on a gain resulting from an exchange or reorganization results in undue hardship to the taxpayer, the Treasury be granted authority to extend the time for the payment of that portion of the tax attributable to such gain for a period not in excess of 2 years.

The elimination of the exchange and reorganization provisions will serve a twofold purpose. First, it will close the door to one of the most prevalent methods of tax avoidance. Second, it will greatly simplify the income tax law by eliminating some of its most complicated provisions. The underlying principle behind all of the exchange and reorganization provisions of the present law is that they do not result in tax exemption, but that the tax is postponed. It is

claimed that many of the so-called exchanges or reorganizations result in mere paper profit, and that to tax them at the time of the exchange will seriously interfere with business. However, under the existing system the taxpayer is able to escape tax on these gains entirely by being permitted to elect the year in which he shall report such gain.

Many of the exchanges and reorganizations which the Supreme Court holds result in taxable income under the Revenue Act of 1917 and prior acts are now made tax-free under the present law. Your subcommittee is of the opinion that any system is unsound which does not tax gains in the year in which realized. The year of realization is the year in which such gains become income under the Constitution, and to defer the taxing of gains until later years opens a wide field of tax avoidance.

For these and other reasons stated in the report of the staff of the joint committee contained in exhibit D of the appendix, your subcommittee is of the opinion that the exchange and reorganization provisions of the present law should not be retained. It is estimated that this change will result in a saving to the Government of at least $18,000,000 annually.

* * * * *

APPENDIX

* * * * *

EXHIBIT D

MEMORANDUM ON EXCHANGES AND REORGANIZATIONS

Under the Revenue Acts of 1913, 1916, and 1917, Congress taxed all gains from

transactions involving exchanges or reorganizations in the year in which such gains were realized. The Supreme Court in a number of cases arising under those acts held that gain was realized in fact in the year in which the exchange or reorganization took place. This was true, although the taxpayer did not receive actual cash but stock or securities, which the court regarded as the equivalent of cash. However, serious opposition to taxing gains of this character developed. It was claimed that such gains were mere "paper profits", i. e., the taxpayer had realized nothing tangible and to tax them seriously interfered with normal business adjustments.

The Revenue Act of 1918 continued the policy adopted in the prior income tax laws of taxing gains when realized, with the one exception of an exchange of stock for stock (in connection with the reorganization, merger, or consolidation of a corporation) when the stock or securities received had no greater aggregate par or face value than the stock exchanged. The history of the act discloses that the House defeated a Senate amendment designed to extend this privilege to other types of transactions.

The first serious change in this policy occurred in the Revenue Act of 1921. That act exempted from immediate tax exchanges of investment and business property for property of like kind and exchanges of stock or securities in connection with corporate reorganizations. It was soon found that these provisions left the door wide open for various devices to avoid tax. Most important of these devices was one whereby property could be transferred to a corporation and its cost to the corporation determined

by the fair market value of the property at the time of the transfer. The corporation would then use such enhanced value in computing its gain from a subsequent sale. Moreover, the exchange provisions permitted a tax-free exchange of stock or securities not connected with a reorganization. Many brokers, investment houses, and bond houses established exchange departments and advertised to their customers that they could exchange securities in such a manner as to result in no taxable gain. The situation became so serious that Congress in 1923 was forced to pass a special act removing the exemption in the case of stock or securities exchanged otherwise than through a corporate reorganization.

The Revenue Act of 1924 is the nucleus about which the present provisions were built. While the later acts have made certain changes in these provisions, such changes were designed to plug up some of the more obvious loopholes without attempting to make any change in principle. All of the reorganizations which the Supreme Court held to result in taxable income under the Revenue Act of 1917 and prior acts are now made tax free under the present law.

The exchange and reorganization provisions of the present law will now be briefly discussed. Under section 112 of the Revenue Act of 1932, gain or loss is recognized upon the sale or exchange of property with certain specified exceptions. These exceptions provide that no gain or loss shall be realized in the following cases:

(1) If investment property or property used in a trade or business is exchanged for property of a like kind. This rule does not apply to stock in trade, property held primarily for sale, or stocks or bonds.

(2) If common stock in a corporation is exchanged solely for common stock in the same corporation;

(3) If preferred stock in a corporation is exchanged solely for preferred stock in the same corporation;

(4) If stock or securities are exchanged solely for other stock or securities in a corporate reorganization;

(5) If property is exchanged by a corporation for stock or securities in another corporation pursuant to a corporate reorganization;

(6) If property is transferred to a corporation by one or more persons and immediately after the transfer such person or persons are in control of the corporation.

Furthermore, if stock or securities are distributed to a shareholder upon reorganization of a corporation without surrender of his stock or securities, no gain is recognized to the shareholder from such receipt. Moreover, if in any of the above transactions the taxpayer receives money or other property in addition to the property specified and there is in fact a gain from the exchange or reorganization, such gain is recognized at that time to the extent of the other property or money received. However, this last rule does not apply to a corporation if the corporation distributes such money or other property to its stockholders.

In support of the theory that the above provisions do not result in tax exemption but merely in tax postponement, the law contains other provisions designed to prevent the taxpayer from stepping up his original cost when he sells the property received in exchange for the old property. The general theory is that the property received in ex-

change takes the place of the old property. In the case of property transferred to a corporation, the law also requires the corporation to use as its basis the cost of the property to the transferor, if after the transfer such transferor controls a majority interest in the corporation.

The underlying principle behind all of the exchange and reorganization provisions of the present law is that they do not result in tax exemption, but that the tax is postponed until a gain is realized from a pure sale or what amounts to a pure sale. The reasons assigned for such a policy are—

(1) That such provisions prevent much of the uncertainty and litigation which was involved in the prior income-tax laws;

(2) Normal business adjustments will not be interfered with if so-called "paper profits" are exempted;

(3) The revenues of the Government will be increased by preventing taxpayers from taking colorable losses.

The Bureau has now had an experience of more than a decade in the administration of these provisions. This experience shows that the abuses under the present policy far outweigh the advantages. In the first place, the provisions of the present law are very involved, difficult to understand, and particularly hard to interpret in the light of actual cases as they arise. The interpretation placed upon these provisions by the Treasury has been overturned by the courts in many cases, so that at present there is a great deal of confusion and uncertainty.

In the second place, the administrative problems in ascertaining the value of property made necessary under the prior acts have not been greatly reduced by the pro-

visions of the law, for where money or other property is received in addition to stock or securities, it is necessary to value the stock or securities in order to determine whether an actual gain has been realized. In many corporate reorganizations, while cash is not involved, the acquiring corporation generally assumes some of the indebtedness of the old corporation, which indebtedness is regarded as the equivalent of cash.

The second reason assigned for the change in policy appears to have been based upon the complaint that taxing the gain when realized seriously interfered with normal business readjustments. The very high tax rates of the 1917 and 1918 acts, it was claimed, imposed upon the taxpayer the burden of having available substantial cash at a time when the transaction resulted in a mere "paper profit." While this claim undoubtedly has some merit, it is believed that the present provisions have been utilized for other purposes of an indefensible character. Many reorganizations have been undertaken for the purpose of avoiding taxes. Furthermore, the present provisions have encouraged the injection into business structure of an unsavory stimulus, such as the organization of large holding companies and the overcapitalization of business.

The third reason assigned was that these provisions would prevent the taking of heavy losses, thereby resulting in an increase in the revenues of the Government. While these provisions may have rendered it more difficult for taxpayers to take losses, it by no means closed the door. The taxpayer upon "legal advice" prior to the arrangement of the terms of the transaction may still take substantial losses in most instances without

actual interference with his original plan and purpose.

The statute provides that upon the sale or exchange of property the entire amount of gain or loss shall be recognized, with certain exceptions. The exceptions are the exchange and reorganization provisions already referred to. If a taxpayer desires to take a loss, it is easy to arrange a transaction falling without the exceptions. On the other hand, if it is desired to pay no tax on the gain, the transaction can be so arranged as to come within the exceptions. In addition, losses from the sale or exchange of stocks and bonds are limited, to a large extent, to the gains from such sales or exchanges, so in many cases a stock or bond loss even if recognized could not be utilized by the taxpayer.

Instead of increasing the Government revenues, these provisions appear to result in a considerable loss of revenue. The theory of postponing the gain by shifting the original cost basis of the transferor over to the transferee or by requiring the transferor to keep his original cost basis for the property he receives in exchange does not compensate the Government for exempting the prior transaction from tax. This is due to the fact that in the year which the taxpayer chooses to realize the gain he may have heavy losses, or the tax rates may be different. Death and other elements may also enter in to create a new cost basis for the property.

One of the main objections to the reorganization provisions is that the recognition of gain depends more upon the form of the transaction than upon the essential facts, undue importance being given to "expert

advice." Therefore, in practice, the sections sometimes result in double taxes and sometimes in complete tax exemption. In many cases the shifting of the cost basis of property over to a transferee corporation frequently causes the tax burden to fall upon the backs of new stockholders, who have paid full market value for their stock.

* * * * *

In view of the matter already presented, the following suggestions are made:

(1) To abolish the exchange and reorganization provisions of the present law.

(2) To eliminate all of the exchange and reorganization provisions of the present law, except those permitting an individual to incorporate his business without being subject to tax.

(3) To require gain to be realized and the tax determined at the time of the exchange or reorganization under plan (1) or plan (2), but not to enforce payment of the tax for a period (A) within 2 years from the date the tax is due, or (B) within 6 months after the property is received is sold, whichever date is the earlier. Under this plan, the Government should be protected by the giving of the proper bond and the suspension of the statute of limitations during this period. In any case where cash is received at the time of the exchange, it is believed that the tax should be paid immediately up to the extent of the cash received.

Under all of the above plans, provision should be made for continuing the basis provisions of existing law with respect to property acquired pursuant to an exchange or reorganization consummated prior to the enactment of the proposed act. This will prevent a taxpayer who has acquired prop-

erty in a tax-free exchange or reorganization from avoiding tax by getting a stepped-up basis.

This memorandum has been prepared by Mr. Colin F. Stam, counsel, and Mr. G. D. Chesteen, corporation auditor, of the staff of the Joint Committee on Internal Revenue Taxation. It meets with the approval of the undersigned.

Respectfully submitted.

L. H. PARKER, *Chief of Staff.*

Statement of the Acting Secretary of the Treasury Regarding the Preliminary Report of a Subcommittee of the Committee on Ways and Means on "Prevention of Tax Avoidance", pp. 9–10:

(5) *Exchanges and reorganizations.*—Early decisions of the Supreme Court indicated that in the absence of any specific statutory provisions an exchange of one piece of property for another piece of property might result in taxable gain or deductible loss, as the case may be. In other words, if a farmer traded one horse for another horse, even without any boot, gain or loss should be computed for income tax purposes. The court did not limit the realization of gain or loss to cases in which the property had a readily realizable market value.

Although these decisions were theoretically justified, Congress came to the conclusion 12 years ago it was not practicable to administer the income tax on this basis. There are doubtless thousands of horse trades and similar barter transactions every year. To attempt to evaluate the property received in exchange in each case would be an enormous administrative task which, particularly in these years, would be very unlikely to show any considerable net revenue.

Consequently, Congress in substance provided that gain or loss would be recognized on exchanges of property having a readily realizable market value, such as stocks, bonds, and negotiable instruments; on exchanges of property held primarily for sale; or on exchanges of one kind of property for another kind of property; but *not* on exchanges of property solely for property of a like kind. This provision has been in effect for 12 years.

The experience of the Treasury is that the provision does not result in tax avoidance or loss of revenue, but rather represents a fair and practical solution of the problem. It will be noted that the exempt exchanges are strictly limited to transactions in which it would be administratively difficult to determine any gain or loss. In the opinion of the Department the abolition of the exchange provisions would not result in increased revenue, while at the same time additional expense in administration would be caused. The Department therefore recommends that no change be made in the exchange provisions.

The reorganization provisions are, as the subcommittee states, perhaps the most complicated and difficult to understand of any sections of the law. In addition to their complexity, they are open to the serious objection of being over specific. When they were adopted in 1924, the draftsmen attempted to state in minute detail exactly how each step of a reorganization should be treated for tax purposes. Although this method had the apparent advantage of enabling taxpayers and their lawyers to determine in advance exactly how proposed transactions would be taxed, it had the dis-

advantage of leaving the Department no leeway in the administration of the law. Consequently, astute lawyers could and did arrange what were really sales to take the technical form of a reorganization within the statutory definition, with resultant loss of revenue. The Treasury has fought a number of these cases through the courts, with results on the whole favorable. The courts have attempted to work out the general principles underlying the statute, and to interpret the specific sections in such a way as to carry out the general plan and to prevent avoidance.

In the light of this experience of 10 years, the Treasury has come to the conclusion that the present provisions should be completely redrafted. The purpose should be to express in the statute as simply as possible the general plan for dealing with these transactions, leaving to the Department as in other cases the power to make rules and regulations to carry out the congressional intent. Congress has previously dealt with the subject of affiliated corporations in this way, with excellent results so far. In the cases of complicated subjects of this kind, it is almost impossible to foresee all the ingenious devices which lawyers will invent, and to provide against them expressly in the statute. The more effective plan is to place the responsibility squarely upon the Department administering the law from day to day. It can readily amend its regulations to cover new situations as they arise.

The question then is whether the present provisions should be scrapped in their entirety before a satisfactory substitute can be framed. The committee should carefully consider several problems before this is

done. In the first place, depreciation and depletion are now calculated for thousands of corporations on the basis of costs figured under the present reorganization provisions. These sections in general required the new corporation to take the same cost as the old for depreciation and depletion purposes, even though the assets had greatly increased in value. If the provisions were abolished outright, many of these taxpayers could and would claim largely increased amounts of depreciation and depletion, with resultant loss of revenue. In the second place, reorganizations today are generally being carried out in order to revise the capital structures of unsuccessful or insolvent enterprises. The immediate result of abolishing the reorganization provisions would be to permit the thousands of bondholders and stockholders of such organizations to establish losses, even though they obtain and retain securities in a new enterprise which is substantially the same as their original investment. Even though it be required that such losses can only be deducted from capital gains, a wide door will be opened to reduction of tax liability. Finally, there are many legitimate reorganizations in which the present general policy of the law is sound; where, as a result of a merger, for example, a stockholder receives 10 shares in a new Illinois corporation in place of 10 shares in the former Ohio corporation. The ordinary shareholder in this situation will find it hard to see why an income tax should be imposed until he sells the new shares.

For these reasons, the Treasury believes that it would be unwise to eliminate completely the exchange and reorganization provisions at this time. The Department is now

working upon a substitute for the present provisions, which will be completed as soon as possible. The task is not easy, on account of the complexity of the transactions involved. Until the various alternatives can be carefully studied, and a plan worked out which will work fairly and safeguard the revenues, it does not appear advisable to abolish completely the present statutory plan. The Department believes, as stated, that the proposal would not only yield no additional revenue, but would result in a net loss.

* * * * *

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 174.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

MINNESOTA TEA COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 99-109) is reported in 28 B. T. A. 591. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 797.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 25, 1935. The jurisdiction of this Court is

invoked by the petitioner under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

1. Whether a transfer by one corporation (the Minnesota Tea Company) of substantially all its properties to another corporation (the Grand Union Company) in exchange for 18,000 shares of the common stock of the latter (worth $540,000 (R. 113)), plus $426,842.52 in cash, followed by the distribution of the cash to the stockholders of the transferor corporation, the transferor corporation remaining in existence and holding as its assets the 18,000 shares of stock of the transferee, constitutes a "reorganization" within the meaning of Sec. 112(i)(1)(A) of the Revenue Act of 1928.

2. Although the petitioner states (p. 2 of the petition) that another question is presented, the respondent respectfully submits that, for the reasons hereinafter stated, any question other than the foregoing is not in issue in this case.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix (pp. 13-16) to the Government's petition, and are not repeated here.

STATEMENT.

The facts, as stipulated before the Board of Tax Appeals, appear to have been correctly stated on pages 2-6 of the Government's petition. A statement of the following phases of the facts seems necessary, however, for a proper understanding of the decision of the court below.

First, in the letter of deficiency (R. 10), the Commissioner held that the transfer of assets to the Grand Union Company constituted a "reorganization" as defined in Sec. 112(i)(1)(A), Revenue Act of 1928, "in that it was the ac-

quisition by one corporation of all the properties of another corporation. Both the Minnesota Tea Company and the Grand Union Company were parties to the said reorganization. General Counsel's Memorandum 3827, Cumulative Bulletin, VII-2, page 114."

The case therefore went to the Board of Tax Appeals, not on any issue whether or not there was a reorganization, but on the sole issue whether the Tea Company, when it distributed the $426,842.52 of cash to its stockholders, in a transaction in which the stockholders agreed to pay certain liabilities of the Tea Company, had as a matter of law distributed pursuant to the plan of reorganization, all the cash or only the net difference between $426,842.52 and the liabilities assumed by the stockholders. The Commissioner took the position that to the extent that liabilities had been assumed by the stockholders, the cash had not been "distributed" within the meaning of Sec. 112(d)(2) of the Revenue Act of 1928, and that, accordingly, taxable gain was recognizable to the Tea Company to the extent of $106,471.73, with a resulting deficiency in income taxes of the Tea Company of $11,587.64 for the taxable year 1928 (R. 11, 15). The taxpayer took the position that all the cash had been "distributed" and that no deficiency was assessable. (R. 4.) Both parties originally briefed and argued the case solely on this issue. (R. 116.)

The Board of Tax Appeals (two members dissenting), in spite of the fact that no question of "reorganization" had been raised by the letter of deficiency, nor by the pleadings and arguments of the parties, and overthrowing the settled administrative practice of more than a decade, held there was no "reorganization," did not pass on the only question raised in the letter of deficiency, and subsequently over the objection of the taxpayer's counsel, entered judgment showing a deficiency of $72,686.90 (R. 114), instead of $11,587.64 as proposed by the Commissioner.

On appeal by the taxpayer to the Circuit Court of Ap-

peals for the Eighth Circuit, the Circuit Court in an able opinion by Judge Booth, rejected the contention of the Commissioner that no reorganization occurred, and held that there was a reorganization (1) within the wording of the statute, (2) under the administrative construction of long standing, and (3) within the intent and purpose of Congress.

Second, no question was ever raised by either party prior to the filing of the petition for certiorari here as to the effect of the organization of the Peterson Investment Company to which certain assets not essential to the business of the Tea Company were transferred prior to the transfer of assets to the Grand Union Company.

In the letter of deficiency (R. 9), the Commissioner held as follows:

> "With reference to the transfer of a portion of its assets to the Peterson Investment Company, since the Minnesota Tea Company or its stockholders, or both, were in complete control of the transferee immediately after the transfer, said transaction clearly constituted a reorganization under Section 112(i)(1)(B) of the Revenue Act of 1928, to which both of said corporations were parties. No taxable gain resulted to the Minnesota Tea Company from this transaction under Section 112(b)(4) of the Revenue Act of 1928."

The Board of Tax Appeals properly assumed that no issue regarding the organization of the Peterson Investment Company was involved. Likewise, in the submission of the case to the Circuit Court of Appeals, no such question as the Commissioner seeks to raise here, was even suggested. In fact, in his oral argument to the Circuit Court, counsel for the Commissioner argued that the transfer to the Peterson Investment Company constituted a "true" reorganization, because the Tea Company stockholders remained in "control," and that the transfer to the Grand Union Company was not a "true" reorganization because the Tea Company or its stockholders were not in "control"

of Grand Union. It was only natural and proper, therefore, that the court below should regard the organization of the Peterson Investment Company as "not of vital importance in the present controversy" (76 F. (2d) 798) and proceed to a decision of the only question before it, whether the transfer by the Tea Company of substantially all its properties to the Grand Union Company constituted a reorganization. Now, however, the Commissioner again shifting his position in the controversy seeks to raise for the first time a question regarding a transaction which in his letter of deficiency,—the only basis for the appeal to the Board of Tax Appeals and all proceedings thereafter,—he had held clearly constituted a reorganization.

SUMMARY OF ARGUMENT.

The transactions here constituted a reorganization within the express definition of reorganization contained in the Act, but they also come within the spirit of the Act as well.

In holding there was a reorganization, the court below merely followed the long-established administrative practice of the Bureau. This administrative practice, shown in the income tax regulations for more than a decade, was adopted by Congress as a part of the law when it reenacted the definition of reorganization, without change, in the Revenue Acts of 1924, 1926, 1928, and 1932.

The point as raised by the Board of Tax Appeals, that no reorganization occurred because the Tea Company was not "dissolved" is a point that had been considered many years previously by the Bureau of Internal Revenue, and held to be without merit. Furthermore, the Act itself shows that dissolution could not have been deemed essential by Congress.

The decision of the court below is not in conflict with the decisions cited by the petitioner. On the contrary, in *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22 (C. C. A., 4th), cited by the petitioner as being in conflict, the court

expressly recognized factors which influenced the court in the decision here. The facts in *John A. Nelson Co.* v. *Commissioner*, 75 F. (2d) 696 (C. C. A., 7th), now pending before this Court on petition for certiorari, and in *G & K Manufacturing Co.* v. *Commissioner*, 76 F. (2d) 454 (C. C. A., 4th) were different from those here involved, where a consideration consisting largely of common stock of the transferee corporation was received in exchange for substantially all the properties of the transferor.

Nor is the decision of the court below in conflict with *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, where only short-term purchase money notes were received.

This case is not at all like *Gregory* v. *Helvering*, 293 U. S. 465. There is no suggestion anywhere in the record that the transactions here were influenced by the desire to avoid tax. On the contrary, in the letter of deficiency (R. 9), the Commissioner held that the organization of the Peterson Investment Company was clearly a reorganization, and at no stage of the proceedings prior to the filing of the petition for certiorari here, has he taken any other position.

ARGUMENT.

The opinion of the court below is able and convincing and covers all the factors necessary to a correct decision of the case.

First, as is shown in that opinion, the transaction by which the Grand Union Company acquired substantially all the properties of the Tea Company, in return for common stock of the acquiring corporation and cash, is clearly within the wording of Sec. 112 (i)(1)(A) of the 1928 Act which provides that

> "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or sub-

stantially all the properties of another corporation) . . ."

As said by the court below, "The language is plain and unambiguous. The ascertainment of its meaning is simple."[1]

Second, in deciding there was a reorganization in this case, the court below merely gave effect to the long-established administrative practice of the Bureau of Internal Revenue.[2] The Commissioner followed the administrative practice when, in the letter of deficiency (R. 10), he held there was a reorganization.

The transaction is clearly a reorganization under the following regulations and rulings:

Art. 1574, Reg. 65 (1924 Act)
Art. 1574, Reg. 69 (1926 Act)
Art. 574, Reg. 74 (1928 Act)
Art. 574, Reg. 77 (1932 Act)
G. C. M. 1753, VI-1 C. B., p. 138
G. C. M. 3827, VII-2 C. B., p. 114.

The court below, in addition to citing the foregoing authorities, referred to *Tulsa Oxygen Co.*, 18 B. T. A. 1283, *National Pipe & Foundry Co.*, 19 B. T. A. 242, 250, *First National Bank of Champlain*, 21 B. T. A. 415, 422, and *Robert D. Green*, 24 B. T. A. 719, 725, and held that the long-continued administrative construction of the language of the definition and the repeated reenactments of it by Congress without change (in the Revenue Acts of 1924, 1926, 1928, and 1932) led to the application of a principle

[1] In *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, 199, this Court said: "It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction, and the statute is to be taken to mean what it says."
The doctrine applies with especial force to tax statutes. *Crooks* v. *Harrelson*, 282 U. S. 55.

[2] On page 9 of his petition here, the Commissioner states: "It is true that the administrative officers have recognized a transaction such as is here involved as satisfying the statute," but fails to cite authorities. In his brief to the court below, the Commissioner made a similar statement and cited the applicable regulations.

well established by the decisions of this Court that such reenactment is an adoption by Congress of the administrative construction. See *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, all decided at the term of Court just ended. In each of those cases, as in this one, the Bureau had by its regulations construed the statute, Congress had reenacted it, and then the Bureau sought to reverse its interpretation. In each of those cases, the attempt of the Bureau was unsuccessful.

Finally, the court below held that the intent and purpose of Congress, as shown in the Committee reports accompanying the various revenue acts, necessitated a holding of "reorganization" in this case, as did the spirit of the Act, and that such holding was in full accord with the decision of this Court in *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462.

The Board of Tax Appeals had held that as no "dissolution" of the Tea Company occurred, "control" of the Grand Union Company by the Tea Company or its stockholders was necessary, for the reason that part (A) of the definition[3] "may not be read so broadly in respect of the acquisition of property for stock as to stultify (B), dealing with the transfer of property for stock." (28 B. T. A. 594.)

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[3] The complete definition, in Sec. 112(i)(1), 1928 Act, reads as follows:

"(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected."

It will be noted that the definition is divided into four major parts, "(A)," "(B)," "(C)," and "(D)."

Dissolution of the transferor corporation has not been required by the administrative practice since 1922.[4]

In so holding, the Board failed to mention, and probably did not know about, certain items of legislative history considered by the court below and which seem to be decisive as to the intention of Congress.

Part (A) of the definition, which covers the transaction here, first appeared in the 1921 Act, Sec. 202(c); in that act there was no provision whatever in regard to reorganizations involving control by the transferor or its stockholders. Reorganizations of the latter type were included for the first time in the Revenue Act of 1924, Sec. 203(h)(1)(B), and the purpose of Congress in inserting the new provision in the definition was clearly stated at the time by the House Ways and Means Committee, which reported as follows:

> "Subdivision (h)(1) contains a definition of reorganization which corresponds to the definition in Section 202(c)(2) of the existing law. The *only change* in the definition is to *include* within its terms the case of a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets are transferred. This is a common type of reorganization, and clearly should be *included* within the reorganization provisions of the statute."[5]

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[4] The 1918 law contained no definition of reorganization, and Art. 1567 of Reg. 45 thereunder had specifically required dissolution. The administrative authorities, when they came to draw the regulations under the 1921 Act, which contained a statutory definition of reorganization, concluded that dissolution could no longer be required in cases like the present one and struck that requirement out of the regulations. See Reg. 62, Art. 1566(b), approved Feb. 15, 1922. No change in the part of the definition here involved was made in the subsequent Acts of 1924, 1926, 1928, and 1932, and the regulations continued to omit the requirement of dissolution. See Art. 1574 of Reg. 65 (1924 Act) and Reg. 69 (1926 Act); Art. 574 of Reg. 74 (1928 Act) and Reg. 77 (1932 Act). Moreover, the Acts themselves show that dissolution could not have been deemed essential by Congress. See the opinion of the court below, at p. 802 of 76 F. (2d); and *Watts* v. *Commissioner*, 75 F. (2d) 981, 983 (C. C. A., 2nd).

[5] Rep. No. 179, 68th Cong., 1st Sess., p. 16; see also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 17; Magill, "Notes on the Revenue Act of 1924," 24 Col. L. Rev. 836, 845.

Obviously, as control was not required under the 1921 Act in cases where substantially all the properties were acquired by another corporation, and as the committee reports show that the "only" change in the definition was to "include" the case of a transfer by a corporation of all or a part of its assets, the matter of control is of no consequence whatever in determining the applicability of part (A) of the definition involved. As long ago as 1927, this fact was brought out by the General Counsel of the Bureau of Internal Revenue in G. C. M. 1753, VI-1 C. B., p. 138, which is cited and quoted in the opinion of the court below. See also *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22, 27.

In its petition for certiorari, the Government asserts (pp. 7-8) that the decision below is in conflict with *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22 (C. C. A., 4th); *John A. Nelson Co.* v. *Commissioner*, 75 F. (2d) 696 (C. C. A., 7th), now pending before this Court on petition for certiorari; and *G & K Manufacturing Co.* v. *Commissioner*, 76 F. (2d) 454 (C. C. A., 4th). It states that the court below in the present case gave no consideration to whether the transaction partook of the nature of a merger or consolidation, holding that the transaction satisfied the literal language of the statute, that the stock represented a continuity of interest, and that the statute required nothing more. From this, it argues, inferentially, that the decision below is inconsistent with *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462.

The respondent submits that, in view of the facts there involved, and reading the opinion of this Court as a whole, the narrow construction which the Government takes as to the Pinellas Case is not warranted;[6] but even assuming the

[6] It would appear that the pith of this Court's decision in the Pinellas Case is found in the following sentence from the opinion: "Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes." (287 U. S., at p. 470.)

soundness of the Government's construction, it seems clear that the determination whether any given transaction "partakes of the nature of a merger or consolidation" is essentially a question of fact concerning which the decisions of the lower courts may properly be deemed as final.

In *C. H. Mead Coal Co.* v. *Commissioner, supra,* the Circuit Court of Appeals for the Fourth Circuit, sustaining the Commissioner, held, as did the court below in the instant case, that part (A) of the reorganization definition is not modified or restricted by part (B) of that definition; the court also held, as did the court below in the instant case, that the legislative history of the reorganization provisions clearly demonstrates that the terms "merger" and "consolidation" are to be given a liberal interpretation to effectuate the purposes with which they were enacted.

The facts in each of the other cases cited by the Government as being in conflict with the decision of the court below were different from those here involved.[7]

It clearly appears that the transactions here partook of the nature of a merger or consolidation. The Tea Company received $540,000 in value of the common stock of the Grand Union Company and there was every element present that would have been present in a strict merger, except technical dissolution of the Tea Company, and dissolution has not, since 1922, been deemed necessary by the administrative practice of the Bureau.[8]

As a further ground for granting the writ, the Government argues (p. 11) that the decision below is in conflict with the decision of this Court in *Gregory* v. *Helvering,* 293 U. S. 465. In neither the court below nor in the Board of Tax Appeals did the Government argue that the transaction

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[7] In *John A. Nelson Co.* v. *Commissioner,* 75 F. (2d) 696 (C. C. A., 7th), the taxpayer, as pointed out by the Government in its memorandum not opposing certiorari, now on file in this Court (No. 61, October Term, 1935), received only preferred stock, callable at the option of the transferee.

In *G & K Manufacturing Co.* v. *Commissioner,* 76 F. (2d) 454 (C. C. A., 4th), there appears to have been a question of fact as to whether "substantially all" the properties were transferred.

[8] See footnote 4, *supra.*

involving the Peterson Investment Company, nor any other transaction herein, was an "elaborate and devious form of conveyance masquerading as a corporate reorganization." On the contrary, as hereinbefore mentioned, the Commissioner ruled in the letter of deficiency (R. 9) that the transfer of assets to the Peterson Investment Company "clearly constituted a reorganization." As also pointed out hereinbefore, counsel for the Commissioner in his oral argument to the court below took the position that the said transaction was a "true" reorganization. There is no suggestion anywhere in the record that the transactions here were influenced by the desire to avoid tax. There was no such purely artificial procedure as formed the basis for the decision of this Court in the Gregory Case, where, as recently pointed out by the Circuit Court of Appeals for the Second Circuit in *Chisholm* v. *Commissioner*, decided July 8, 1935, the purpose of the incorporators was "merely to draught the papers" and not in fact to create real corporations.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

August, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 174

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner

v.

MINNESOTA TEA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 174

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner

v.

MINNESOTA TEA COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 83) is reported in 28 B. T. A. 591. The opinion of the Circuit Court of Appeals (R. 112) is reported in 76 F. (2d) 797.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 25, 1935. (R. 124.) The petition for certiorari

was filed June 25, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked by the petitioner under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the following transaction constitutes a "reorganization" within the meaning of Sec. 112 (i) (1) (A), Revenue Act of 1928: The respondent (Minnesota Tea Company) transferred all its properties to another corporation (Grand Union Company) in exchange for common stock (voting-trust certificates) of the latter, which the Tea Company continued to hold, plus a sum in cash which the Tea Company immediately distributed to its stockholders, who assumed certain liabilities of the Tea Company.

Whether it is material here that the respondent had previously transferred certain of its assets to a corporation, Peterson Investment Company, for all the Peterson Company stock, and distributed all such stock to its stockholders.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 39-46.

STATEMENT

This is an income tax case involving the question whether gain or loss is recognizable under the following facts, and if so, in what amount. The claimed deficiency is for the taxable period January 1, 1928 to August 24, 1928 (R. 4).

On August 23, 1928, the Minnesota Tea Company transferred all its property to the Grand Union Company in exchange for 18,000 shares of the common stock (voting-trust certificates) of that company, worth $540,000 (R. 94), plus $426,842.52 in cash. The Tea Company thereupon distributed all of the cash to its stockholders, who assumed

liabilities of the Tea Company to the extent of $106,471.73 (R. 12). The Tea Company continued to hold and own the shares of stock in Grand Union, and did not dissolve (R. 12).

In the notice of deficiency, the Commissioner of Internal Revenue held that the transfer of assets to the Grand Union Company constituted a "reorganization," as defined in Sec. 112 (i) (1) (A) of the Revenue Act of 1928, "in that it was the acquisition by one corporation of all of the properties of another corporation" (R. 7), and that the case was therefore governed by Sec. 112 (b) (4) and Sec. 112 (d) of that Act.

As to the distribution of the $426,842.52 of cash, the Commissioner ruled (R. 8), that to the extent of $106,471.73 of liabilities assumed by the stockholders, the Tea Company had not made a "distribution," within the meaning of Sec. 112 (d) of the 1928 Act, and that accordingly, taxable gain was recognizable to the Tea Company to that extent, with a resulting $11,587.64 deficiency in the income taxes of the Tea Company.

When the Tea Company filed its petition (R. 3) to the Board of Tax Appeals, it was not on any issue whether or not there was a reorganization, but on the sole issue whether it had "distributed" all of the cash or only the difference between $426,842.52 and $106,471.73, within the meaning of Sec. 112 (d) of the 1928 Act. The taxpayer took the position that all of the cash had been distributed within the meaning of that section, and that no deficiency was assessable (R. 3). Both parties originally briefed and argued the case solely on this issue (R. 97).

The Board of Tax Appeals (two members dissenting), in spite of the fact that no question of "reorganization" had been raised by the notice of deficiency, nor by the pleadings and arguments of the parties (R. 103), held there was no "reorganization," did not pass on the only question raised in the notice of deficiency, and subsequently entered judg-

ment showing a deficiency of $72,686.90 (R. 95), instead of $11,587.64 as proposed by the Commissioner.

On appeal by the taxpayer to the Circuit Court of Appeals for the Eighth Circuit, that court rejected the contention of the Commissioner that no reorganization occurred, and held that there was a reorganization (1) within the wording of the statute, (2) under the administrative construction of long standing, and (3) within the intent and purpose of Congress (R. 112-123).

The case was reversed and remanded to the Board of Tax Appeals for a decision on the "distribution" point originally raised in the notice of deficiency and which the Board had not decided (R. 124). The petition for certiorari was from this decision.

The respondent's position is that the decision of the Circuit Court of Appeals is correct and that in accordance with that decision the case should be returned to the Board of Tax Appeals for its decision whether the deficiency of $11,587.64, as originally proposed by the Commissioner, is properly assessable.

In his petition for certiorari filed in this Court, the Commissioner raised a question which he had not previously raised, based on the dissenting opinion in the court below—as to whether in view of the earlier organization of the Peterson Investment Company, "substantially all" the properties of the Tea Company were acquired by the Grand Union Company. While opposing such view on the merits, the respondent submits that, since there was no such issue in the case when it was tried, and since the case was tried on a stipulation that all the properties were conveyed to the Grand Union Company (R. 11), this issue is not in the case.

SUMMARY OF ARGUMENT

(1) The transaction comes squarely within the unambiguous terms of the applicable revenue statute. Sec. 112 (b) (4), 1928 Act, provides that no gain or loss shall be recognized if a corporation a party to a reorganization ex-

changes property, in pursuance of a reorganization plan, solely for stock or securities in another corporation a party to the reorganization. Sec. 112 (d) provides that if an exchange would be within the foregoing provision but for the fact that money or other property is received in addition to stock or securities, no gain shall be recognized to the corporation if the money or other property is distributed to the stockholders.[1]

Sec. 112 (i) (1) (A) provides that the term "reorganization" means a merger or consolidation, including the acquisition by one corporation of substantially all the properties of another corporation. The transaction here constituted a reorganization within the express definition, and gain is therefore to be determined under Sec. 112 (b) (4) and Sec. 112 (d), mentioned above.

The fact the Tea Company was not dissolved is not material, for the Act shows that Congress did not intend to require dissolution as a necessary element. Thus, Sec. 112 (d) by covering cases where the corporation does not distribute, recognizes that the transferor corporation may remain in existence. In the same parenthetical phrase of Sec. 112 (i) (1) (A) involved in this case, Congress provided that the acquisition by one corporation of "at least a majority" of the stock of another corporation should constitute a reorganization; dissolution could not have been contemplated for the reason that "at least a majority" of the stock would generally be insufficient to bring about a dissolution.

Since 1922, the administrative practice, as shown by the income tax regulations, has not required dissolution as a necessary element in a reorganization.

(2) Under administrative practice, built up during more than a decade and clearly reflected in the income tax regulations, a transaction of the kind here involved is a reorganization. The regulations recite a specific illustration of

[1] On receiving such distribution the stockholders must pay any tax due from them on that account.

a reorganization which is on all fours with this case. See Reg. 74, Arts. 574-575, not cited or considered by the Board of Tax Appeals in its opinion (R. 83). The Commissioner's finding in the deficiency notice (R. 7) that there is a reorganization here, was issued in conformity with these settled regulations. The administrative practice was, in effect, adopted by Congress when it reenacted the definition of reorganization, without change, in the Revenue Acts of 1924, 1926, and 1928. *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172.

(3) Reports of Congress, quoted herein, show specifically that Congress, in prohibiting the recognition of gain or loss in such situations as this, did so because such prohibition is in the interest of the United States—to remove uncertainty, to avoid interference with business adjustments, to eliminate technical constructions which are economically unsound, to permit business to go forward with adjustments, to attain definiteness and accuracy, and to avoid loss of tax from the allowance of certain losses.

In order to give effect to these purposes, first announced in connection with the 1921 Act, Congress adopted in that Act for the first time a definition of the term "reorganization" which was much broader than ordinary usage of the term. The legislative history, as well as the terms of the law, clearly shows that the definition was intended to be broader than mere merger and consolidation.

Part (A) of the 1928 definition, under which the present transaction is shown to be a reorganization, contains the same language that appears in the 1921 Act, reappearing as Sec. 203 (h) (1) (A), 1924 and 1926 Acts, and Sec. 112 (i) (1) (A), 1928 Act.

In 1924, the definition was expanded to include a situation not covered by the 1921 Act, namely, (Part (B))—a transfer by a corporation of all or a part of its assets to another corporation which is controlled by the transferor or its stockholders. The Committees of Congress re-

ported that the "only change" in the 1921 definition was to "include" within its terms the situation just mentioned.

As the 1921 definition contained no requirement of "control," and as the intention of Congress in 1924 was not to make any change in the definition in that Act, but only to add something to it, it seems indisputable (1) that control is not of any consequence in cases involving Part (A), the "acquisition by one corporation of * * * substantially all the properties of another corporation," and (2) that Part (B) was not meant to limit Part (A), enacted three years earlier.

The same legislative history shows that Parts (A) and (B) of the definition were not meant to be "mutually exclusive," as claimed by the petitioner.

The suggestion of the majority opinion of the Board of Tax Appeals that it is necessary to have a continuance of "essentially the same" interests (R. 86) has no foundation in the decisions it cites, or in Congressional intent. In the Pinellas case (287 U. S. 462), cited by the Board, this Court said "an interest" was necessary. In the Cortland case (60 F. (2d) 937), the other decision relied on by the Board, the Circuit Court said there should be a "continuity" or "continuance" of interest. These requirements are satisfied here, since the stock in Grand Union received by the Tea Company continues its interest and subjects it to the risks of the business.

Clearly, if a small corporation is merged by statutory merger into a large corporation, the small corporation or its stockholders will have only a small proportionate interest in the large corporation, and will acquire an interest in substantially different assets. Congress did not intend that the tax results should be any different when, as in this case, there is a transaction coming within the parenthetical language in Part (A). The terms of the statute and its legislative history show that such was not the intent of Congress.

It is clear from the terms of the statute that Congress was not concerned whether the value of the "other prop-

erty or money" was small or large, as compared with the value of the "stock or securities." The Act makes full provision for the taxation of gain, however large the other property or money, and the disallowance of any loss.

The income tax regulations for many years have contained a specific example in which the amount of the "boot" is greater than the value of the stock. This example also appeared in a statement, released to the public by the Chairman of the Ways and Means Committee, explaining the provisions of the Revenue Bill of 1924.

(4) In the Pinellas case, 287 U. S. 462, where the real issue was whether short-term notes were "securities," this Court corrected the court below (which had indicated that the provisions of the parenthesis in Part (A) were limited to strict mergers and consolidations) and pointed out that the parenthesis expands the meaning beyond merger and consolidation, so as to include cases not within the ordinary meaning, where a continuing interest is maintained. Our position accords with this reasoning, and with the emphasis placed in the Pinellas case on the established view of the tax officers. Here the Tea Company retained stock in Grand Union worth $540,000, and thus continued to hold a definite and vital interest in the affairs of the latter company. A transaction of this type, involving the receipt of stock or securities and a consequent continuing interest, is basically in the nature of a merger or consolidation.

(5) There is no issue in this case as to whether the Tea Company transferred all its properties to the Grand Union Company, because both parties so stipulated (R. 11). Also, the Commissioner's notice of deficiency so held (R. 7).

On the merits, the petitioner's contention in this respect is ill-founded. All that is required in this respect is that, at the time of reorganization, substantially all the properties of the Minnesota Tea Company be acquired by Grand Union. The established view of the Bureau of Internal Revenue is to the effect that if a corporation declares a dividend of part of its assets in advance of transferring its

assets to another corporation in reorganization, in such case the later transfer is of all of the assets. G. C. M. 1345, VI-1, C. B., p. 15. Congress could not have intended to make a sharp difference between (1) the previous transfer of assets by dividend and (2) their transfer to another corporation, followed immediately by the delivery of the stock of that corporation to the stockholders. Furthermore, Congress must have known that in statutory mergers, particularly of national banks, it is often required by the Comptroller of the Currency or by other interests, that the corporation being merged shall first divest itself of ownership of undesirable assets. Such statutory mergers being clearly within the intent of Congress, no reason appears why different rules should have been intended here.

ARGUMENT

Congress expressly prohibited the recognition of gain or loss in certain circumstances—using the words "shall not be recognized." The prohibition of gain and loss in such circumstances was considered to be in the interest of the United States; the present case is precisely within that prohibition, to the extent that the Tea Company distributed the cash to its stockholders, as shown by the terms of the law itself, the settled administrative practice for more than ten years—followed by the Commissioner even in this case—and clear legislative history.

I. The Terms of the Statute.

The intention of Congress, we submit, is properly to be determined first by the language which Congress used—particularly in the very specific tax statute, in which definitions have been made very precise. Compare *Adams Express Company* v. *Kentucky*, 238 U. S. 190, 199; *Crooks* v. *Harrelson*, 282 U. S. 55.

In Sec. 112 (i) (1) of the 1928 Act, Congress defined the term "reorganization" in the following language:

> "(1) *Definition of reorganization.*—As used in this section and sections 113 and 115—(1) the term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected." [1]

Specifically, the transaction here was a reorganization under Sec. 112 (i) (1) (A) because there was "an acquisition by one corporation (the Grand Union Company) . . . of . . . substantially all the properties of another corporation (the Minnesota Tea Company)."

Sec. 112 (b) (4) expressly directs that—

> "No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization." [2]

The transaction here does not come within Sec. 112 (b) (4) because the Tea Company did not receive "solely" stock or securities in the Grand Union Company, in exchange for its properties.

---

[1] The definition is thus divided into four major parts, "(A)", "(B)", "(C)", and "(D)".

[2] As has been previously noted, since Grand Union acquired substantially all the properties of Minnesota Tea, there was a reorganization.

Both corporations were parties to the reorganization within the meaning of Sec. 112 (i) (2). See also G. C. M. 3827, VII-2 C. B., p. 114; G. C. M. 7472, IX-1 C. B., p. 184.

However, the statute makes equally direct provision for a case of the kind here involved, in Sec. 112 (d) which provides:

> "If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—
>
> "(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorgnization no gain to the corporation shall be recognized from the exchange, but
>
> "(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

As the Tea Company received (1) 18,000 shares of the common stock of Grand Union worth $540,000, and (2) the sum of $426,842.52 in cash, it remains only to determine whether the money was distributed by the Tea Company to its stockholders, pursuant to the plan of reorganization. If the money was so distributed,[1] then no gain is to be recognized to the Tea Company, the purpose of Congress[2] being that an accounting for the cash shall be made by the stockholders and not by the corporation.

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[1] If, however, the money has not been distributed by the Tea Company, or any part of it, gain is to be recognized to the Tea Company in an amount not in excess of the sum of the money which is not so distributed. Thus there arises in this case the question which was originally raised by the Commissioner in his notice of deficiency, namely, whether to the extent that liabilities were assumed by the stockholders, such cash has been distributed by the Tea Company within the meaning of Sec. 112 (d).

[2] See Ways and Means Committee, Rep. No. 179, 68th Cong., 1st Sess., p. 15; Senate Finance Committee, Rep. No. 398, 68th Cong., p. 16.

Dissolution Not Necessary

The Act itself shows that Congress did not intend to require dissolution as a necessary element in a reorganization. Sec. 112 (d) affirmatively recognizes the fact that the transferor corporation need not be dissolved, for it provides that if the transferor corporation elects not to distribute, gain will be recognized "in an amount not in excess of the sum of such money and the fair market value of such other property so received which is not so distributed." The specification of this tax result necessarily implies that the transaction is to be regarded as coming within the definition of reorganization in the case where the transferor corporation is not dissolved, as well as where dissolution does occur. Obviously, a corporation which does not distribute its assets is not dissolving.

Again, in the same parenthetical phrase of Sec. 112 (i) (1) (A) involved in this case, Congress provided that the acquisition by one corporation of "at least a majority" of the stock of another corporation should constitute a reorganization. Dissolution in this type of case could not have been contemplated for the reason that "at least a majority" of the stock would generally be insufficient to bring about a dissolution. The provision in regard to the acquisition of "substantially all the properties" is so closely allied with that in regard to the acquisition of "at least a majority" of the stock that Congress could hardly have intended to require dissolution in the one case without requiring it in the other.

Since 1922, the administrative practice as shown by the income tax regulations has not required dissolution as a necessary element in a reorganization. This precise question as to the necessity for dissolution was considered by the administrative authorities when the regulations under the Revenue Act of 1921 were first promulgated in 1922, more than eleven years prior to the time the Board of Tax Appeals, in the instant case announced its adherence to

the proposition that dissolution was necessary. The 1921 Act was the first act containing the words which appear in parenthesis in Sec. 112 (i) (1) (A) of the 1928 and prior acts. The 1918 law contained no definition, and the regulations thereunder had specifically required dissolution.[1] The administrative authorities, when they came to draw the regulations under the 1921 Act which contained a statutory definition of "reorganization" concluded that dissolution could no longer be required and struck that requirement out of the regulations.[2] Four different revenue acts, those of 1924, 1926, 1928, and 1932, were passed in the following years, making no change in this part of the definition of reorganization, and each successive edition of the regulations continued to omit the requirement of dissolution.[3] (The latest regulations omit such requirement.)[4] The practice of the Bureau of Internal Revenue was continuous and consistent for more than eleven years until the Board of Tax Appeals again raised the question whether a dissolution was necessary.

II. Administrative Practice.

The transaction here was a reorganization not only under the express provisions of the Act, but also under long-established administrative practice as shown in the income tax regulations for more than a decade. When the Commissioner held in his deficiency notice that there was a

[1] Reg. 45, Art. 1567 (promulgated Jan. 28, 1921, under the 1918 Act) mentioned the following as among the permissible types of reorganization: "(b) the sale of its property by B to A and the *dissolution* of B, or (c) the sale of the stock of B to A and the *dissolution* of B."

[2] The first regulations promulgated under the 1921 Act, Reg. 62, Art. 1566(b), approved Feb. 15, 1922, eliminated the requirement of dissolution and mentioned the following as among the permissible types of reorganization: "(2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B."

[3] See Art. 1574 of Reg. 65 (1924 Act) and Reg. 69 (1926 Act); Art. 574 of Reg. 74 (1928 Act) and Reg. 77 (1932 Act).

[4] Reg. 86, Art. 112(g)-3 (1934 Act).

reorganization,[1] he was following this settled administrative practice.

Reorganization cases have constantly been presented to the Bureau in a great variety of circumstances. In the applicable regulations under the Revenue Act of 1928, the Bureau has stated clearly and specifically and at some length certain kinds of transactions which would come within the definition.[2] Thus, in Article 574, Reg. 74, under that Act, it is stated:

> ". . . If two or more corporations reorganize, for example, by . . . (3) the acquisition by the Y Corporation . . . of substantially all the properties of the X Corporation . . . then no taxable income is received from the transaction by the X Corporation . . . if the sole consideration received by the corporations is stock or securities of the Y Corporation. . . ."[3]

Immediately following that article comes Article 575 which applies to the situation where "other property or money" is received together with stock or securities, in which case the regulation provides that:

> "If the other property or money received by the corporation is distributed by it pursuant to the plan of reorganization, no gain to the corporation will be recognized."

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[1] The Commissioner's language was as follows: "With reference to the transfer of the remaining assets to the Grand Union Company on August 23, 1928, it is to be noted that said assets constituted all the properties then owned by the Minnesota Tea Company. Said transfer, therefore, falls within the definition of a reorganization as set out in Sec. 112 (i) (1) (A) of the 1928 Act in that it was the acquisition by one corporation of all the properties of another corporation. Both the Minnesota Tea Company and the Grand Union Company were parties to said reorganization. General Counsel's Memorandum 3827, Cumulative Bulletin, VII-2, page 114." (R. 7.)

[2] On p. 9 of his petition for certiorari, the Commissioner stated: "It is true that the administrative officers have recognized a transaction such as is here involved as satisfying the statute." In his brief to the court below, the Commissioner made a similar statement and cited the applicable regulations. In his latest brief (p. 29) he takes the position that "the administrative practice, as represented by the Treasury Regulations" has not been "sufficiently specific to support the decision below."

[3] A full text of the applicable regulations appears in the Appendix at pages 43-46, *infra*.

This article then states that if the other property or money is not so distributed, the gain, if any, to the corporation will be recognized—

> "in an amount not in excess of the sum of the money . . . so received which is not distributed . . ."

As regards the transaction here involved, the earlier regulations consistently treated such transactions as reorganizations. See Art. 1574, Reg. 65 (1924 Act); and Art. 1574, Reg. 69 (1926 Act). Congress reenacted the statutory definition of "reorganization" in the Revenue Acts of 1924, 1926, 1928, and 1932 without change.[1]

As pointed out by the court below (R. 115), prior to the decision of the Board of Tax Appeals in the instant case the Board had uniformly held that transactions of the type here involved were reorganizations. See *Tulsa Oxygen Co.*, 18 B. T. A. 1283; *National Pipe and Foundry Co.*, 19 B. T. A. 242, 250; *First National Bank of Champlain*, 21 B. T. A. 415, 422; and *Robert D. Green*, 24 B. T. A. 719, 725.

III. Intent Shown by Legislative History.

The intent and purpose of Congress, as shown in the Committee reports accompanying the various acts, require a holding that this is a "reorganization," as does the spirit of the Act.

The Committee reports which accompanied the various acts show that the general purposes of Congress in enacting the reorganization provisions were—

> (1) To remove impediments to ordinary business transactions, which otherwise would not be consum-

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[1] In *United States* v. *Cerecedo Hermanos y Compañía*, 209 U. S. 337, 339, this Court said:

> "And we have decided that the reenactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction."

See also *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Helvering* v. *Bliss*, 293 U. S. 144; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, all decided at the term of Court just ended.

mated on account of the provisions of the tax law heavily taxing gains which were realized only in the form of stock or securities, in "paper" profits so to speak.

(2) To disallow losses which otherwise would have been deductible as a result of such transactions.

(3) To provide for certainty in the rules governing the tax effects of such transactions, certainty being desirable from the standpoint of the taxing authorities as well as that of the taxpayer.

(4) To rely on the "basis" provisions, substituting the cost basis of the property formerly owned as the cost basis on the property newly-acquired (with adjustments for gain or loss recognized on the transaction in question), as a means of safeguarding the revenues and equitably preserving any "loss" position of the taxpayer.

Remove Impediments to Business Transactions

Thus, at the time of enactment of the Revenue Act of 1921, which contained the first definition of reorganization and which contained the same provision as Part (A) of the definition here involved, the Senate Finance Committee reported as follows:

"Under existing law 'when property is exchanged for other property, the property received in exchange shall, for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value, if any. . . .' Probably no part of the present income tax law has been productive of so much uncertainty or has more seriously interfered with necessary business readjustments. . . . .

". . . The proposed act . . . specifies . . . certain classes of exchanges on which no gain or loss is recognized. . . .

"The preceding amendments, if adopted, will, by removing a source of grave uncertainty and by eliminating many technical constructions which are economically unsound, . . . permit business to go forward

with the adjustments required by existing conditions.'"[1]

Again, in reporting the 1924 Revenue Bill, which extended the reorganization provisions to situations not theretofore covered and which provisions were basically the same as those in the 1928 Act here involved, the Senate Finance Committee reported:

> "Paragraph (3) provides that no gain or loss is recognized if a corporation a party to a reorganization exchanges property for stock or securities in another corporation a party to the reorganization. There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The present ruling of the Treasury Department on this question is of doubtful legality and a statutory provision is most necessary.
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> "Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation.'"[2]

Desire for Certainty

In connection with the 1924 bill, the Ways and Means Committee also reported:

> "It appears best to provide generally that gain or loss is recognized from all exchanges and then except specifically and in definite terms those cases of exchange in which it is not desired to tax the gain or allow the loss. This results in definiteness and ac-

[1] Rep. No. 275, 67th Cong., 1st Sess., pp. 11-12. See also Ways and Means Committee Report, Rep. No. 350, 67th Cong., 1st Sess., p. 10.

[2] Rep No. 398, 68th Cong., 1st Sess., pp. 14-15. Similar remarks appear in the Ways and Means Committee Report, Rep. No. 179, 68th Cong., 1st Sess., p. 13.

curacy and enables a taxpayer to determine prior to the consummation of a given transaction the tax liability that will result therefrom." [1]

Again, in regard to the new paragraph (3), mentioned in the foregoing quotation from the Senate report, the Ways and Means Committee said:

"The statute should contain a definite rule on this question." [2]

Purpose to Disallow Paper Losses

As to the desire to disallow losses which otherwise would have been deductible, in reporting the 1921 provisions the Senate Finance Committee said the new provisions would considerably increase the revenue—

"by preventing taxpayers from taking colorable losses in wash sales and other fictitious exchanges" [3]

Basis Provisions

As to the intention of Congress to rely on the basis provisions as a means of safeguarding the revenues and preserving any "loss" position in which the taxpayer might find himself, the 1921 report of the Ways and Means Committee states:

"Proper safeguards are found in subdivisions (e) and (f), which provide that where property is exchanged for other property and no gain or loss is recognized the property received shall be treated as taking the place of the property exchanged, for the purpose of determining gain or loss and for the purpose of deter-

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[1] Rep. No. 179, 68th Cong., 1st Sess., p. 13. See also the views of the Democratic Minority members of the Committee, at p. 77 of this report; the minority said,—"We believe the law should be made definite and specific so every taxpayer will know under the law his rights and will not be required to have his tax adjudicated upon the discretion of the Treasury officials." See also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 14.

[2] *Ibid*, at p. 13.

[3] Rep. No. 275, 67th Cong., 1st Sess., pp. 11-12. See also Ways and Means Committee, Rep. No. 350, 67th Cong., 1st Sess., p. 10.

mining certain important deductions, such as those for depreciation."[1]

Again, in 1924, the Ways and Means Committee reported:

"The provisions of Sec. 203 of the bill that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended.[2] These provisions are based upon the theory that *the types of exchanges specified* in Sec. 203 *are* merely *changes in form and not in substance,*[3] and consequently should not be considered as effecting a realization of income at the time of the exchange. In other words, these provisions result not in an exemption from tax but in a postponement of tax until the gain is realized by a pure sale or by such an exchange as amounts to a pure sale. It follows, therefore, that in the case of such an exchange the property received should be considered as taking the place of the property exchanged. If in connection with the exchange money is received which is not taxed, obviously the basis at which the old property is carried on the books of the taxpayer should be reduced to that extent, since the taxpayer has in part

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[1] Rep. No. 350, 67th Cong., 1st Sess., p. 10. See also Senate Finance Committee, Rep. No. 275, 67th Cong., 1st Sess., p. 12.

[2] On p. 9 of his brief, the Commissioner argues that the reorganization provisions are "exemptions" and should be strictly construed. On p. 32 of the brief, the argument is continued with the suggestion that the provisions constitute a "Congressional bounty." On p. 33, it is argued, in effect, that the provisions should be "meticulously" limited in their application.

The exemption argument is, of course, answered by the language of the Committee on Ways and Means. Also, as the provisions have to do with the recognition of loss as well as gain, it is evident that if they are interpreted narrowly in a case involving gain the Government is adversely affected in other cases involving losses.

[3] When the language which we have italicized is construed in the light of the provisions which it explains, it shows that the expression "changes in form and not in substance" is used in a broad and not a narrow sense. Where a small corporation is merged into a larger corporation, the stock of the latter corporation received by the old owners represents an interest in entirely new assets. Yet this report says that this is a change in form and not in substance. So with all the other exchanges specified in Sec. 203, (Sec. 112, 1928 Act), which in the view of Congress are to be regarded *per se* as changes of form and not in substance. The broad use of the "form and substance" idea which enabled Congress to say that these are changes in form and not in substance involves the fact, common to all these circumstances, that the taxpayer still has only paper profits—except to the extent that "money or other property" has been received. To that extent provision is made for the taxation of gain.

received a return of capital. But if money is received in connection with the exchange and the money is taxed, it is equally obvious that the basis of the old property should not be affected.'"

In order to give effect to these purposes, first announced in connection with the 1921 Act and clearly shown in the Committee reports from which we have quoted, Congress in the Revenue Act of 1921, Sec. 202 (c), the first act to contain a definition of "reorganization," adopted a special definition of that term[2] which was much broader than ordinary usage of the term. The language of the 1928 Act under which the present transaction is shown to be a reorganization is the same language that appears in the 1921 Act, reappearing as Part (A) of the definition in the 1924, 1926, and 1928 Acts.

This purpose was clearly apparent from the very beginning. The 1921 bill, as reported by the Ways and Means Committee and as passed by the House, provided that the term should include—

"a merger, consolidation (however effected)" etc.[3]

When the bill reached the Senate, it was amended so as to make the definition even broader, by providing that reorganization should include not only "merger" and "consolidation" but also—

"the acquisition by one corporation of at least a majority of the voting stock and at least a majority of

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[1] Rep. No. 179, 68th Cong., 1st Sess., pp. 16-17. See also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., pp. 17-18.

[2] Sec. 202 (c), 1921 Act, provided that "the word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation (however effected)."

[3] H. R. 8245, 67th Cong., 1st Sess.

> the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation."[1]

The Conference Committee reported that the Senate amendment "adds" to the definition in the House bill the cases of majority stock acquisitions and acquisitions of properties.[2] It is clear from the legislative history of the definition that, as held by this Court in *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, the definition was intended to be broader than mere merger and consolidation.

When the 1924 Act was adopted the definition of reorganization was expanded to include a situation not covered by the 1921 Act. This was accomplished by adding to the definition a new provision, Part (B), which read as follows:

> "The term 'reorganization' means . . . (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."[3]

The purpose of Congress in thus expanding the definition was stated at the time by the Ways and Means Committee which reported as follows:

> "Subdivision (h) (1) contains a definition of reorganization which corresponds to the definition contained in Sec. 202 (c) (2) of the existing law. The only *change* in the definition is to *include* within its terms the case of a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets are transferred. This is a common type of reorganization,

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[1] See Conference Report, Rep. No. 486, 67th Cong., 1st Sess., pp. 17-18. See also G. C. M. 3535, IX-2 C. B., p. 127.

[2] Rep. No. 486, 67th Cong., 1st Sess., p. 17 (Amendment No. 47).

[3] Sec. 203(h) (1) (B), 1924 Act, which is the same as Sec. 112 (i) (1) (B) of the 1928 Act here involved.

and clearly should be *included* within the reorganization provisions of the statute."[1]

As the 1921 Act contained no requirement whatever for "control", and as the intention of Congress was not to make any change in the definition in that Act, but only to add something to it, it seems indisputable that control is not of any consequence in cases involving the "acquisition by one corporation of . . . substantially all the properties of another corporation," such as is the case here.[2]

The same legislative history shows the error in the Commissioner's argument (p. 15 of his brief) that Parts (A) and (B) of the definition are "mutually exclusive." The new provision, incorporated for the first time in the 1924 Act, could not exclude something which was in the mind of Congress when it passed the 1921 Act, when the reports clearly show that Congress did not desire to change the provisions of the 1921 Act, but only to add to them a situation not theretofore covered.[3]

There is further legislative history and consistent administrative construction showing that Parts (A) and (B) were not meant to be mutually exclusive. These parts of the definition, as well as all the other parts, are joined by the word "or" which means "and/or". In reporting the

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[1] Rep. No. 179, 68th Cong., 1st Sess., p. 16; see also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 17; Magill, "Notes on the Revenue Act of 1924", 24 Col. L. Rev. 836, 845.

[2] The Commissioner in his brief (p. 31), seems to admit that control is not necessary. See, in accord, G. C. M. 1753, VI-1 C. B., p. 138.

[3] The majority opinion of the Board indicates that it did not have before it all the legislative history, particularly the fact that Part (A) had been expressly enacted three years before Part (B) of the definition (mentioning control) was added in 1924. Thus, the Board said:

> "An examination of the history of these provisions seems to indicate that there was no deliberate design to differentiate between the phraseology of (A) and (B), but only to bring together, within the definition of reorganization, *language which had already been used in separate parts of the statutory scheme;*" (R. 86.)

When Part (B) was enacted in 1924, it introduced language that had not been in the statutory scheme when Part (A) had been enacted in 1921. This misunderstanding may account for the Board's erroneously concluding that Part (B) limits Part (A).

1924 bill, the Ways and Means Committee made this meaning clear. Said the Committee:

> "It should be noted that in paragraphs (b) and (c) of this section, as well as in other provisions of the proposed bill, the conjunction 'or' is used to denote both the conjunctive and the disjunctive."[1]

The applicable income tax regulations also provide:

> "As used in Sec. 112, as well as in other provisions of the Act, the conjunction 'or' is used to denote both the conjunctive and the disjunctive."[2]

Any other interpretation cannot possibly be supported by an analysis of the language of the definition. Thus, if Corporations X and Y are owned by the same stockholders and Corporation X is taken over by Corporation Y in a statutory merger, there is clearly (A) a merger and at the same time (B) a transfer by X of its assets to a controlled corporation. It is even possible to assume a case which falls within three different parts of the definition. Thus, in some circumstances a statutory merger of one corporation into another corporation, controlled by the same stockholders, would be not only (A) a merger and (B) a transfer of assets to a controlled corporation, but also (D) a mere change in the form of organization.

The suggestion of the majority opinion of the Board that it is necessary to have a continuance of "essentially the same" interests (R. 86) has no foundation in the decisions it cites or in Congressional intention. In the Pinellas case, cited by the Board, this Court said:

> " . . . the seller must acquire *an interest* in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes." 287 U. S. 462, 470.

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[1] Rep. No. 179, 68th Cong., 1st Sess., p. 14.

[2] Reg. No. 74, Art. 577 (1928 Act). See also Reg. 65, Art. 1577 (1924 Act) and Reg. 69, Art. 1577 (1926 Act).

A careful examination of the opinion of the Circuit Court in the Cortland case, the other decision relied on by the Board, fails to disclose that the court ever used the phrase "essentially the same" interests. All that court held was that there should be a "continuity" or "continuance" of interest, the court using the following language:

> "When describing the kind of change in corporate structure that permits exemption from these taxes, Sec. 203 (1926 Act) does not disregard the necessity of *continuity of interests* under modified corporate forms."
>
> "Each transaction presupposed a *continuance of interest* on the part of the transferor in the properties transferred." 60 F. (2d) 937, 940.

This requirement is satisfied here, since the Tea Company received stock in Grand Union.

It is quite evident from the terms of the entire definition of "reorganization" as well as from its legislative history that situations in which the taxpayer's capital investment remains "substantially the same" or where the change is only "formal," are merely one type of the several types contemplated by the law.[1]

Clearly, if a small corporation is merged by statutory merger into a large corporation, the small corporation or its stockholders will have only a small proportionate interest in the corporation which takes over the assets. Moreover, after the merger the interest of the small corporation or its stockholders will not be in the same assets but in a larger group of assets, of which the assets formerly owned by the small corporation will constitute only a small part. Since this is frequently the result in a statutory merger,

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[1] On page 29 of his brief, the Commissioner states: "The regulations . . . emphasize that the statute is dealing with corporate reorganizations which result only in a change of form which does not substantially affect the property interests of either the shareholders or the corporations." A careful search by us of Reg. 74, promulgated under the 1928 Act and applicable to this case, fails to disclose any statement to that effect.

there is no reason why the tax results should be any different when, as in this case, the larger corporation acquires the assets of the smaller corporation in a transaction coming within the parenthetical language of Sec. 112 (i) (1) (A) of the Act. The terms of the Act and its legislative history show that such was not the intent of Congress.[1]

It is also clear from an examination of the exchange provisions, Sec. 112 (b) (4) and Sec. 112 (d) in particular, that the only continuity of interest which Congress intended was that the transferor corporation or its stockholders should receive some "stock or securities." When stock or securities are received, the capital investment of the taxpayer is to that extent continued in the other corporation and *subjected to the risks of the business.*[2]

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[1] In fact, Congress has definitely provided that the transferee corporation in such cases shall take a new basis for the assets in question, that is, "cost" to it as distinguished from the basis which the transferor corporation had. The provision, Sec. 113 (a) (7), 1928 Act (reprinted at p. 42, *infra*) requiring the transferee corporation to use the old basis applies *only* when an interest or control of 80 per centum or more remains in the old owners. There is no doubt whatever as to this result. In addition to Sec. 113 (a) (7), see Reg. 74, Art. 599 (which provides "It should be noted that property may be acquired in connection with a reorganization without the provisions of Sec. 113 (a) (7) . . . . being applicable, because of the fact that an interest or control of 80 per cent or more does not remain in the same persons"). See also Ways and Means Committee, Rep. No. 179, 68th Cong., 1st Sess., p. 54; Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess., p. 18; *Metropolitan Ice Co.*, 32 B. T. A. .... (No. 81, Apr. 10, 1935); and *Northwest Bancorporation*, 33 B. T. A. .... (No. 27, Oct. 10, 1935).

Thus, the argument which the Commissioner makes on pp. 19-20 of his brief, that the transferee is always required to assume the basis of the transferor, is founded on a misunderstanding of the law and the regulations.

[2] As a substantial amount of stock was received by the Tea Company in the instant case, it is unnecessary to decide whether securities alone would have given the Company a "continuing interest." Clearly, stock in the transferee corporation does give the transferor such an interest. In passing, however, it may be noted that the receipt of securities alone (bonds, for example) would have been sufficient, for in reporting the 1924 bill, the House Ways and Means Committee said: "The provisions of paragraph (2) are complied with if 'stock and securities' are received in exchange as well as if 'stock or securities' are received." Rep. No. 179, 68th Cong., 1st Sess., p. 14. The regulations for many years have contained similar language. See Reg. 65, Art. 1577 (1924 Act); Reg. 69, Art. 1577 (1926 Act); Reg. 74, Art. 577 (1928 Act); Reg. 77, Art. 577 (1932 Act); and Reg. 86, Art. 112 (g)-2 (1934 Act). It thus appears that such cases at *Hay Foundry & Iron Works*, 33 B. T. A. .... (No. 22, Sept. 30, 1935), and the dictum in *Worcester Salt Co.* v. *Commissioner*, 75 F. (2d) 251, (C. C. A. 2nd), holding that while bonds are "securities," they do not give "continuity of interest," are wrong.

Congress did not intend to confine the nonrecognition of gain or loss to cases where "stock or securities" are the sole consideration, for it made full provision in Sec. 112 (c) and Sec. 112 (d), for the taxation of gain where "other property or money" is received. To the extent that "other property or money" is received, the capital investment is not continued. To that extent the original investment is liquidated; provision is made for the taxation of any gain (in the instant case either to the Tea Company or its stockholders); provision is also made, in Sec. 112 (e), for the disallowance of any loss in such cases.

It is also clear that Congress was not concerned whether the value of the "other property or money" was small or large, as compared with the value of the "stock or securities." In cases of gain, the Government fares better if the larger part of the consideration consists of other property or money, for under the law the amount of recognizable and taxable gain increases as the other property or money increases. On the other hand, Sec. 112 (e) arbitrarily forbids the recognition of a loss in any such case. There is thus no occasion for the "close scrutiny" suggested on page 20 of the Commissioner's brief.

On page 20 of his brief, without referring to any legislative history specially bearing on the matter, the Commissioner argues that "Congress expected it (the other property or money) to be comparatively insignificant in amount."[1] We submit that the answer to this argument is found in the very clear provisions of Sec. 112 (c), Sec. 112 (d) and Sec. 112 (e). These sections of the law make full provision for the taxation of any gain and the disallow-

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[1] If valid, the Commissioner's argument would have to include not only reorganization cases but also all the other types of exchanges specified in Sec. 112. Thus, a farmer could not exchange his farm ("productive use or investment" property; Sec. 112 (b) (1)) for another farm plus any substantial sum of cash, without having the full amount of any gain recognized to him.

ance of any loss,[1] whether the amount of the other property or money be small or large. Had Congress intended any limitation upon the application of these provisions depending upon the amounts of other property or money received on the exchange it surely would have so stated in the statute.

There is, moreover, specific indication, aside from the language of the statute, that the relative size of the "boot" is immaterial. In January, 1924, Chairman Green of the House Ways and Means Committee released to the public a "Statement of the Changes in the Revenue Act of 1921 by the Treasury Department and the Rreasons Therefor,"[2] prepared for the use of the Ways and Means Committee by A. W. Gregg, at that time Special Assistant to the Secretary of the Treasury and later General Counsel of the Bureau of Internal Revenue. In explaining the "basis" provisions of the 1924 bill, later enacted as a part of the 1924 law, the Statement set forth the following "example" among others:

> "Example 4.—A purchased a share of stock in the X Company for $100. The X Company is reorganized into the Y Company and A receives, in place of his stock in the X Company, a share of stock in the Y Company, worth $50, a Liberty bond worth $40, and $10 in cash. . . ."

The Statement then proceeded to explain how the basis for the Y Company stock and the Liberty bond was to be determined. The important thing for the purpose here is that the "other property or money" was not "insignifi-

[1] The Commissioner's argument, if valid, would result in the virtual nullification of Sec. 112 (c) which inhibits the recognition of loss where "other property or money" is received. Thus, if in a given case the other property or money were not insignificant in amount, the taxpayer would, if the Commissioner's argument is valid, be entitled to deduct in full his loss on the transaction.

[2] The Statement was printed in full in the New York Times for January 5, 1924.

cant" but equal in value to the share of the Y Company stock.

The Statement also contained the following additional example:

> "Example 5.—A purchased a share of stock in the X Company for $100. The X Company is reorganized into the Y Company, and A receives, in place of his share of stock, a share of stock in the Y Company, worth $60, a Liberty bond worth $50, and $20 in cash. Under Sec. 203 (d), A realized a gain of $30 from the exchange."

Here the total value of the other property or money was $70.00, as compared with a value of $60.00 for the stock.

Example 5, which we have quoted from the Statement prepared by Mr. Gregg and released to the public by Chairman Green, was incorporated almost verbatim in Art. 1596 of Reg. 65, promulgated under the 1924 Act, and has reappeared in each successive draft of the regulations, including those promulgated under the Revenue Act of 1934.[1]

IV. The Pinellas Case.

In *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, the facts were that one corporation transferred its assets to another corporation, in return for cash and short-term purchase money notes. The real issue was whether the notes were "securities," and it would appear that the pith of this Court's decision is found in the following sentences from the opinion:

> "These notes—mere evidence of obligation to pay the purchase price—were not securities within the intendment of the act and were properly regarded as the equivalent of cash."
>
> "Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs

[1] See Reg. 86, Art. 113(a)(6)-1 (1934 Act); Reg. 77, Art. 597 (1932 Act); Reg. 74, Art. 597 (1928 Act); Reg. 69, Art. 1596 (1926 Act); and Reg. 65, Art. 1596 (1924 Act).

of the purchasing company more definite than that incident to ownership of its short-term purchase money notes." (287 U. S. 462, 468, 470.)

However, as the court below had, in addition to holding that the notes were not securities, indicated that Part (A) of the reorganization definition was confined to technical mergers and consolidations,[1] this Court apparently felt that the situation required it to go further and to correct the lower court as to the narrow interpretation which the lower court had given to the definition. This Court said:

> "The court below held that the facts disclosed failed to show a 'reorganization' within the statutory definition. And, in the circumstances, we approve that conclusion. But the construction which the court seems to have placed upon clause (A) . . . we think is too narrow. It conflicts with established practice of the tax officers and if passed without comment, may produce perplexity."
>
> " . . . The words within the parenthesis may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes. This general view is adopted and well

[1] The lower court said: "It must be assumed that . . . Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point." (57 F. (2d) 188, 190.)

sustained in Cortland Specialty Co. v. Commissioner of Internal Revenue, C. C. A. (2d), 60 F. (2d) 937, 939, 940. It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed." (287 U. S., at pp. 469-470.)

Our position in this case accords with the opinion of this Court in the Pinellas case, in that—

(1) The Minnesota Tea Company, by reason of its ownership of the 18,000 shares of stock worth $540,000, in the Grand Union Company, had a definite and vital interest in the affairs of the latter company;

(2) There was a "merger" within the meaning of that term as "expanded" by the words within the parenthesis, in that the Grand Union Company acquired all the properties of the Tea Company and gave in exchange therefor a consideration consisting, in substantial part, of shares of its own stock;

(3) A transaction of this type, involving the receipt of "stock or securities" by the transferor or its stockholders is basically in the nature of a merger or consolidation, for the old owners maintain a continuing interest and are subjected to the risks of the business. Such formalities as dissolution of the transferor have no bearing on the basic similarity in which Congress was interested, namely, the receipt of stock or securities by the transferor.

(4) Our position is in accord with the established practice of the tax officers.

The Pinellas decision, correcting a narrow view of the court below in that case, cannot be authority for going back in this case to the same narrow view.

V. Miscellaneous Government Arguments.

Plan of Reorganization

On pages 23-26 of his brief, the Commissioner makes an argument which he has not heretofore advanced in this

case. He argues "there was no plan of reorganization," that the record is bare of any evidence that the petitioner and the Grand Union Company "desired to effect a reorganization," and that the proceedings were "couched in terms of purchase and sale."

If there was a reorganization in this case as a matter of law, there was a "plan." The transfer of the properties to Grand Union, the receipt by the Tea Company of the Grand Union stock and the cash, and the distribution of the cash to the Tea Company stockholders, was all done pursuant to a plan (R. 11) involving a written contract and various corporate resolutions. These resolutions used the term "reorganization" in describing the transaction (R. 13, 22).

The Commissioner's brief attaches great significance to the use by the parties of the terms "sale" and "purchase" in various instances. Obviously, a reorganization cannot be converted into a sale by merely calling it a sale. Nor can a sale be made into a reorganization by calling it a reorganization. The important thing is what the parties actually do; if they do things which the law directs to be treated as a reorganization, the transaction is a reorganization. If they do not, there is no reorganization, no matter what they call it.

The Commissioner's position here is in sharp contrast with administrative practice. The income tax regulations for many years made no such distinction in terminology and consistently described reorganization transactions as "sales"[1]; the Committees of Congress have also described them as "sales"[2]; and this Court in the Pinellas case[3] spoke of the "seller" and the "purchasing company" in connection with reorganization transactions.

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[1] See p. 13, notes 1 and 2, *supra*, and Reg. 45, Art. 1567 (1918 Act); Reg. 62, Art. 1566 (1921 Act); Reg. 65, Art. 1574 (1924 Act); Reg. 69, Art. 1574 (1926 Act).

[2] Ways and Means Committee, Rep. No. 179, 68th Cong., 1st Sess. (1924 Act), p. 15, used "sale" and "selling corporation" in describing reorganizations of the precise kind involved in the instant case. See also Senate Finance Committee, Rep. No. 398, 68th Cong., 1st Sess. (1924 Act), p. 16.

[3] 287 U. S. 462, 470.

Voting-Trust Certificates

On page 26 of his brief, the Commissioner makes another argument which he has not heretofore advanced in this case. He argues that while the common stock voting-trust certificates gave the respondent a "proprietary interest," the respondent "had no voice in the management of the business," and that it retained only the right to "share in the earnings."

It is, of course, well-known that voting-trust certificates evidence the real and beneficial ownership of the stock which is in trust.[1] As much seems to be admitted by the Commissioner when he speaks of the certificates as giving the respondent a proprietary interest.

As we have heretofore shown in this brief,[2] it was the intention of Congress that either "stock" or "securities" could be received without any recognition of gain or loss. An owner of "securities" does not ordinarily have even a proprietary interest. He does not ordinarily share in the corporate profits as such. If such an interest is sufficient, as the legislative history and the administrative practice show it to be, how much more so is ownership of certificates of the kind here involved.

Voting-trust certificates for the common stock of Grand Union Company were listed on the New York Stock Exchange.[3] They were the equivalent of common stock, which may be either voting or non-voting. The Tea Company by reason of owning them had a continuing interest in the business of the Grand Union Company.

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[1] Compare *Margaret E. Kidder*, 30 B. T. A. 59, where it was held that a sale of common stock voting-trust certificates, at less than cost, and the purchase of an equal number of shares of common stock on the same day was a "wash sale" and did not give rise to a deductible loss. Compare also G. C. M. 2177, VI-2 C. B., pp. 112, 114.

[2] See p. 25, note 2, *supra*.

[3] See p. 20 of the Record in the Peterson Cases, Nos. 175-176, Oct. Term, 1935.

Dividends Taxable When Distributed

On pages 22-23 of his brief, the Commissioner argues that Congress intended that transferor corporations should be dissolved, for the reason that if the transferor is not dissolved, the dividends which it receives on the stock of the transferee will be "permanently" exempted from tax. As heretofore shown, the Act itself and the long-established administrative construction show that dissolution is not intended to be essential.[1] Furthermore, the dividends in question are taxable to the stockholders of the Tea Company when distributed, and Sec. 104 of the 1928 Act imposes a heavy penalty of 50 per centum on any corporation which permits its income to be accumulated for the purpose of preventing the imposition of the surtax upon its stockholders.[2]

Peterson Investment Company

On July 14, 1928, prior to any ratification by its stockholders of the contract to transfer assets to the Grand Union Company (R. 26) the Minnesota Tea Company transferred a portion of its assets not essential to its main business (which was "that of selling teas, coffees, and groceries at retail" (R. 10) to the Peterson Investment Company,[3] in exchange for all of the capital stock of the latter corporation, which stock was distributed to the stockholders of the Tea Company in the manner specified by Sec. 112 (i) (1) (B) and Sec. 112 (g) of the Revenue Act of 1928.

The point now raised[4] in the Commissioner's brief (p.

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[1] See pp. 12-13, *supra*.

[2] See also Sec. 104, 1932 Act; Sec. 220, 1926 and 1934 Acts. Compare Sec. 102, 1934 Act, in which the penalty is 25 per cent and 35 per cent, depending upon the amount of income.

[3] These assets comprised only 11.3 per cent of the assets of the Tea Company. See R. 9, Peterson Cases, Nos. 175-176, Oct. Term, 1935.

[4] At no time when the case was pending before the Board or the court below did the Commissioner allege (either by filing a pleading or by suggestion in argument) that the transactions herein were other than *bona fide* or that the transfer to the Peterson Investment Company and the transfer to the Grand Union Company were in fact only one transaction, or that the parties had purposes other than they actually carried out. Thus, these fact issues are not in the case.

33) to the effect that, because of such transfer, the Tea Company did not transfer substantially all of its properties to Grand Union, is contrary to the stipulated fact that—

> "On August 23, 1928, petitioner transferred all of its assets to Grand Union Company." (R. 11.)

See also the stipulation in the Peterson cases (Nos. 175-176, Oct. Term, 1935; R. 18) in which the Commissioner stipulated that—

> "The said Minnesota Tea Company transferred all of its assets to Grand Union Company."[1]

The majority opinion of the court below held that the transfer to the Peterson Investment Company was "not of vital importance in the present controversy" (R. 112) and proceeded to decide the question before it, whether the transfer by the Tea Company of substantially all its properties to the Grand Union Company constituted a reorganization. The point on which the Commissioner now relies was suggested for the first time by the dissenting opinion. (R. 119.)

Our position is that Congress did not intend that a transfer of assets such as was made to the Peterson Investment

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[1] While opposing on its merits the view raised by the Commissioner, the respondent submits that the issue is not in the case. The Commissioner's previous position, in addition to his stipulation as to the facts, is shown in the following parts of the Record:

(1) In the notice of deficiency, the Commissioner expressly ruled (a) that the transfer to the Peterson Investment Company was "clearly" a nontaxable reorganization within the meaning of Sec. 112(i)(1)(B), and allocated the basis which the stockholders had for their stock in the Tea Company between the Tea stock and the Peterson stock in proportion to their fair market values, and (b) that the transfer to the Grand Union "falls within the definition of a reorganization as set out in Sec. 112(i)(1)(A) of the 1928 Act in that it was the acquisition by one corporation of all the properties of another corporation." The Commissioner cited "General Counsel's Memorandum 3827, Cumulative Bulletin, VII-2, page 114." (R. 7.)

(2) When the Board member indicated his inclination to hold there was no reorganization, the Commissioner filed a memorandum brief conceding "that the General Counsel still considered this nontaxable (*sic.*) reorganization." (R. 105.)

(3) In his motion for rehearing, filed for the purpose of claiming an increased deficiency, the Commissioner again indicated his appreciation that the case involved "the acquisition by one corporation of substantially all of the properties of another corporation." (R. 91.)

Company should affect the application of Sec. 112 (i) (1) (A) of the Act, and that this is supported by the administrative practice of the Bureau of Internal Revenue.

(1) Thus, the Bureau of Internal Revenue holds that a corporation may declare a dividend of part of its assets to its stockholders in advance of transferring all of its assets to another corporation in reorganization. See G. C. M. 1345, VI-1 C. B., p. 15, issued in 1927.[1]

If it be true that a previous dividend does not render impossible a subsequent transfer of all the assets, the same must be true where the first transaction takes the form of a transfer to a corporation followed by a distribution of the stock to the stockholders. It is often a physical impossibility to transfer assets to stockholders by way of a dividend, for example, where as here, the assets consist of real estate. (R. 27.) Ordinary and normal business practice frequently points to the desirability of transferring such assets to a corporation and distributing the stock of the corporation. There are other business advantages in incorporation; for example, if real estate is distributed in undivided interests to stockholders, there may be difficulties later as to the title in the event one of the owners dies or the interest of an owner is subjected to attachment or sold under execution or a judgment lien is filed on such interest.

(2) Congress obviously intended that the tax results in this respect should be the same in reorganizations involving the acquisition by one corporation of "substantially all" the properties of another corporation as in reorganizations by way of *statutory* merger or consolidation. As to the latter, it is frequently the case that, prior to the statutory merger or consolidation, assets not apt to the statu-

[1] The facts were that the M Company, after a dividend distribution to its stockholders transferred its remaining assets to the S Company for stock in that company, which it distributed to its stockholders. "Since the actual transfer of the properties to the S Company," said the General Counsel, "took place after the distribution by the M Company of . . . cash . . . and . . . stock in the Q Company it constituted a transfer of substantially all the assets of one corporation to another, and, therefore, constituted a reorganization." Compare I. T. 1850, II-2 C. B., p. 8.

tory merger or consolidation are distributed as a dividend or transferred to a separate corporation. Such transfers are frequently made prior to the merger or consolidation of national banks.[1] As is generally known it is the practice of the Comptroller of the Currency to require that a bank being merged or consolidated into another banking corporation shall first divest itself of the ownership of undesirable assets. Obviously, in such a case there is a statutory "merger" within the meaning of the tax law. We submit that such is equally true in other cases involving reorganizations such as those within the parenthetical language in Sec. 112 (i) (1) (A). There is no logical reason why Congress would have desired to make a rule applicable to statutory mergers and consolidations and then outlaw similar transactions otherwise falling within the expanded meaning of "merger and consolidation."

(3) The only practicable rule, and, indeed, the only rule which works consistently as to statutory mergers and consolidations and the expanded meanings of those terms, and which results in the certainty and the definiteness which Congress intended in the enactment of the reorganization provisions,[2]—is the one which has been adopted by the Bureau of Internal Revenue in G. C. M. 1345 already cited and which was followed by the Commissioner in his notice of deficiency in this case, namely, that in determining whether "substantially all" the properties of one corporation have been acquired by another corporation, one looks at the date of the actual transfer of ownership of the properties in question. If any prior date is to be taken as determinative, the question inevitably arises whether it is to be a date one week previous, one month, or one year, or five years. Any such rule would be difficult in administrative application as well as outside the Congressional intent.

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[1] See, for example, *Walter Hopkins*, 27 B. T. A. 1331, 1333-1334; *Nat'l Bank of the Republic of Chicago*, 31 B. T. A. 680, 681; I. T. 1850, II-2 C. B., p. 8.

[2] See p. 17, *supra*.

(4) The facts call for no application of the principles announced by this Court in *Gregory* v. *Helvering*, 293 U. S. 465. In the Gregory case, the corporation had an ephemeral existence, having been organized and dissolved, all within six days; all for the sole purpose of procuring a transfer of properties to Mrs. Gregory in order that she might sell them for her individual profit. As this Court said, "It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function," and "When that limited function had been exercised, it immediately was put to death."

Here the Peterson Investment Company continued in possession and ownership of the assets. The Commissioner, as directed by Sec. 113(a)(9) of the Act and Art. 600 of Reg. 74, allocated the stockholders' basis for their stock between the Peterson stock and the Tea Company stock in proportion to their fair market values. (R. 7.) There is nothing in the record which even tends to indicate that the Peterson Company was not organized in good faith to hold and deal in real estate and other investments as an active business. For aught that appears, it is today engaged in that business.

That the transaction might or could have been accomplished differently does not mean that it was a sham or a mere contrivance to avoid taxes. As aptly said by the Circuit Court of Appeals in the Gregory case, "the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution." (69 F. (2d) 809, 811.) Convenience and expediency[1] consistent with a lawful purpose are entirely suf-

[1] When the assets of Minnesota Tea Company were transferred to Grand Union Company, there were also transferred to it "the good will and all trade-marks and trade names and the right to use the name 'Minnesota Tea Company.'" (R. 29.) Under these circumstances, it would have been wholly inexpedient and a cause of confusion, if Minnesota Tea Company should continue to hold and deal in real estate and other investments, while the Grand

ficient to meet the requirements of the reorganization provisions.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

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November, 1935.

Union Company was operating its business under the same name. Furthermore, if it had changed its name, the name Minnesota Tea Company would have been no longer exclusive to it, and the purchase by Grand Union of the right to use that name (a right which Grand Union apparently considered of great value) would have meant nothing.

APPENDIX

Revenue Act of 1928.

Sec. 112. Recognition of Gain or Loss.

(a) General rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.—

(1) PROPERTY HELD FOR PRODUCTIVE USE OR INVESTMENT.—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale; nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(2) STOCK FOR STOCK OF SAME CORPORATION.—No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more

persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(c) Gain from exchanges not solely in kind.—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) Same—gain of corporation.—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of

such other property so received, which is not so distributed.

(e) Loss from exchanges not solely in kind.—If an exchange would be within the provisions of subsection (b) (1) to (5), inclusive, of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(f) Involuntary conversions.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

(g) Distribution of stock on reorganization.—If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(h) Same—effect on future distributions.—The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits within the meaning of section 115(b) for the purpose of determining the taxability of subsequent distributions by the corporation.

(i) **Definition of reorganization.**—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) **Definition of control.**—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * * * * * * *

Sec. 113. Basis for Determining Gain or Loss.

(a) **Property acquired after February 28, 1913.**—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * * *

(7) TRANSFERS TO CORPORATION WHERE CONTROL OF PROPERTY REMAINS IN SAME PERSONS.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same persons or any of them, then the basis shall be

the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer; * * *

INCOME TAX REGULATIONS 74 (1928 ACT).

ART. 574. **Exchanges in connection with corporate reorganizations.**—The Act provides that no gain or loss shall be recognized if, in pursuance of a plan of reorganization, stock or securities in a corporation a party to a reorganization are exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization, or if, in pursuance of a reorganization plan, a corporation a party to a reorganization exchanges property solely for stock or securities in another corporation a party to the reorganization. If two or more corporations reorganize, for example, by—

(1) The merger of the X Corporation into the Y Corporation.

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) The acquisition by the Y Corporation of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of the X Corporation or of substantially all of the properties of the X Corporation, or

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—

then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporations is stock or securities of the Y Corporation; and no taxable income is received from the transaction by the shareholders of either the X

Corporation or the Z Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation.

If a reorganization is accomplished by the transfer by the X Corporation of a part of its assets to the Y Corporation in exchange for the stock of the Y Corporation and the X Corporation distributes to its shareholders the stock of the Y Corporation no gain to the shareholders from the receipt of such stock is recognized. (See article 576.)

Provision is made in the Act for cases in which gain to the shareholders is recognized, in connection with a reorganization, through the receipt of cash or property other than the stock of a corporation a party to the reorganization. (See article 575.)

Records in substantial form showing the basis of the stock or property exchanged and the amount of property or money received in exchange, must be kept to enable the determination of gain or loss from a subsequent disposition of the stock or property received in exchange.

Art. 575. **Exchanges in reorganizations for stock or securities and other property or money.**—If stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged for stock or securities in such corporation or in another corporation a party to the reorganization and other property or money, the gain, if any, to the recipient will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property. No loss from such an exchange will be recognized. (See section 112 (e).) If a distribution of property or money in the course of a reorganization is otherwise within the provisions of this paragraph, but has the effect of the distribution of a taxable dividend, there shall be taxed to each distributee (1) as a dividend, such an amount of the gain recognized under this paragraph as is not in excess of the distributee's ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913, and (2) as a gain from the exchange of property, the remainder of the gain recognized under this paragraph.

Example (1): A, in connection with a reorganization, exchanges in 1928 a share of stock in the X Corporation, purchased in 1921 for $100, for (*a*) a share of stock in the Y Corporation, a party to the reorganization, which has a

fair market value of $90, and (*b*) $20 cash. The gain from the transaction, $10, is recognized and taxed to A. See article 597 for the basis for determining gain or loss from a subsequent sale.

Example (*2*): The X Corporation has a capital of $100,000 and earnings and profits of $50,000 accumulated since February 28, 1913. The X Corporation in 1928 transfers all its assets to the Y Corporation in exchange for the issuance of all of the stock of the Y Corporation and the payment of $50,000 in cash to the shareholders of the X Corporation. A, who owns one share of stock in the X Corporation, for which he paid $100, receives a share of stock in the Y Corporation worth $100 and in addition $50 in cash. A will be liable to the surtax on $50.

If, in pursuance of a plan of reorganization, property is exchanged by a corporation a party to a reorganization for stock or securities in another corporation a party to the reorganization and other property or money, then, if the other property or money received by the corporation is distributed by it pursuant to the plan of reorganization, no gain to the corporation will be recognized. If the other property or money received by the corporation is not distributed by it pursuant to the plan of reorganization, the gain, if any, to the corporation from the exchange will be recognized in an amount not in excess of the sum of the money and the fair market value of the other property so received which is not distributed. In either case no loss from the exchange will be recognized. (See section 112 (c).)

ART. 576. **Receipt of stock or securities in reorganization.**—If, without any surrender of his stock or securities, a shareholder in a corporation a party to a reorganization receives in pursuance of the plan of reorganization stock or securities in such corporation or in another corporation a party to the reorganization, no gain to the shareholder will be recognized.

ART. 577. **Definitions.**—The term "reorganization," as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

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NOV 18

No. 174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*

v.

MINNESOTA TEA COMPANY.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE

J. S. Y. IVINS,
Amicus Curiae
c/o Brewster, Ivins & Phillips,
805 15th Street, N. W.,
Washington, D. C.

COMPARISON OF REORGA

1 Title of Case	2 S. Ct. No.	3 Acquiring Party	4 What Acquired	5 From Whom Acquired	6 Consideration Given	7 What Done With Consideration	A T
Helvering v. *Minnesota Tea Co.*	174	Corp. A (Grand Union Company)	All *assets* of Corp. B (Minnesota Tea Co.)	*Corp.* B.	Voting trust ctfs for 18,000 common stock of A plus cash.	A stock held by B Corp. Cash distributed to B's stockholders who assumed B's liabilities.	
John A. Nelson Co. v. *Helvering*	61	Corp. A (Sundstrand Corporation of Delaware) created for purpose of acquiring A's assets.	Substantially all *assets* of Corp. B (John A. Nelson Co., formerly called Sundstrand Corporation—an Illinois corporation) i.e., all but $100,000 cash constituting less than 3% of assets.	*Corp.* B.	All of A's preferred stock plus cash.	Stock and cash distributed forthwith among B's stockholders.	
Helvering v. *Watts*	184	Corp. A (Vanadium)	All *stock* of Corp. B. (Ferro Alloys)	Respondents (*Stockholders* of B).	32,103* shares A stock plus 161,184.50 in bonds of B guaranteed by A.	Respondents continued to hold stock and bonds received.	
Helvering v. *Sicard*	185						
Helvering v. *Sloane*	186						
The G & K Mfg. Co. v. *Commissioner*	187	Corp. A (Kraft Phenix Cheese Corp.)	All *assets* of Corp. B (Gelfand Mfg. Co.)	*Corp.* B. (Gelfand Mfg. Co.—name later changed to G & K Mfg. Co.)	17,250 shares common stock of A (with restriction on sale) plus cash.	A stock held by B Co.—later exchanged for debentures and stock of a successor to A.	

* Number finally settled 1/1/1926 under agreement of 12/6/1924.

8 Against Whom Tax Asserted	9 What Became of Corporations	10 Applicable Statory Provision	11 Decision Below
Corp. B.	Both continued.	Rev. Act 1928 § 112(i): 1) The term 'reorganization' means (A) a merger or nsolidation (including the acquisition by one corporati of * * * *substantially all the properties* of another corration)."	C.C.A. 8. 76 F. (2d) 797. Held: Transaction a "reorganization."
Corp. B.	Resolution called for dissolution of Corp. B.	Rev. Act 1926 § 203(h) () A: "The term 'reorganization' means (A) a mergeor consolidation (including the acquisition by one corportion of * * * *substantially all the properties* of another orporation). Also § 203(b) (3), § 203(e) (1)."	C.C.A. 7. 75 F. (2d) 696. Held: Transaction not a reorganization within meaning of statute.
Respondents	B continued through 1925 to determine earning power for computation of consideration to be given. A caused dissolution of B in 1927-1928.	Rev. Act 1924 § 203(h): '(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least *a majority of the voting stock* and at least a majority of the total number of shares of all other classes of stock of another corporation * * *)."	C.C.A. 2. 75 F. (2d) 981. Held: Transaction a "reorganization," and bonds to be "securities."
Corp. B.	Both Corps continued.	Rev. Act 1928 § 112(i): "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of * * * *substantially all the properties* of another corporation)."	C.C.A. 4. 76 F. (2d) 454. Held: No "reorganization."

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Pinellas Ice & Cold Storage Co. v. Commissioner, 21 B.T.A. 425, 57 Fed. (2d) 188, 287 U. S. 462 ..... 3, 4, 5, 7

Sarther Grocery Co. v. Commissioner, 22 B.T.A. 1273, affirmed 63 Fed. (2d) 68 3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 174

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*

v.

MINNESOTA TEA COMPANY.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned, attorney for several taxpayers interested in the correct interpretation of section 112(i) of the Revenue Act of 1928, and similar statutes, respectfully moves this Court for leave to file the subjoined brief as a friend of the Court. Counsel for both parties have given their consent.

J. S. Y. Ivins.

November 18, 1935.

BRIEF

I.

HISTORICAL ORIGIN OF THE CONFUSION IN INTERPRETATION OF THE REORGANIZATION PROVISIONS OF THE STATUTES.

The history of the statutory provisions under consideration in the four reorganization cases (No. 174, *Helvering* v. *Minnesota Tea Co.;* No. 61, *John A. Nelson Co.* v. *Helvering;* No. 184, *Helvering* v. *Watts,* etc.; No. 187, *G & K Mfg. Co.* v. *Commissioner)* and the history of the departmental construction of those cases has been covered in detail in several of the briefs filed by counsel for taxpayers. (See particularly the brief for the respondent in the *Minnesota Tea Co.* case, brief of Edward H. Green, as amicus curiae in the *Watts* case, No. 184, and the brief for the respondent in that case.)

The various decisions of the courts and the Board of Tax Appeals have been discussed at some length in all the briefs in all the cases, but it is thought that a brief reference to them in chronological order may shed some light that will be of assistance to the court.

Prior to 1930, it appears to have been assumed by everybody that when the statute defined reorganization as including the acquisition by one corporation of substantially all the assets of another or of the majority of the voting stock and the majority of all other classes of stock of another corporation, it meant what it said. The definition was an arbitrary one, put in the statute for the purpose of constituting a step in the process of determining when gain or loss should be recognized in respect to certain types of transactions. The danger that taxpayers might claim that gain on their transactions was not to be recognized, even in cases where the acquisition

mentioned above was by purchase rather than by exchange, was taken care of in other sections of the statute—which avoided recognition of gain only in cases of *exchange* for stock or securities. If there was no exchange for stock or securities, gain in the transaction was taxable whether or not there was any "reorganization" within the arbitrary statutory definition.

The first disputes arose over the meanings of "sale," "exchange" and "securities" and not with respect to the meaning of "reorganization," "merger" or "consolidation." In *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 21 B.T.A. 425, decided by the Board of Tax Appeals on November 24, 1930, *Cortland Specialty Co.* v. *Commissioner,* 22 B.T.A. 808, decided March 19, 1931, and *Sarther Grocery Co.* v. *Commissioner,* 22 B.T.A. 1273,[1] decided April 22, 1931, the Board of Tax Appeals upheld the Commissioner of Internal Revenue in his rulings that the transactions considered were "sales" and not exchanges for stock or securities. The *Pinellas* case and the *Cortland* case involved transactions wherein the consideration consisted of cash and some short-term notes. In the *Sarther* case, the consideration was only cash. The Board held, in each instance, that there was a sale. It commented in the *Pinellas* case that there was no necessity for passing on the meaning of "reorganization." In the *Cortland* case, the Board discussed the meaning of "reorganization" and indicated that a true sale could not be regarded as a reorganization, consolidation or merger. This discussion was really obiter since the decision rested entirely on the holding that the short-term notes should not be considered "securities." In the *Sarther* case, the Board based its opinion entirely upon the meanings of "sale" and "exchange", and cited the *Pinellas* case.

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[1]Affirmed 63 Fed. (2d) 68, C.C.A. 7.

When the *Pinellas* case reached the Circuit Court of Appeals for the Fifth Circuit,[2] that court departed from the *ratio decidendi* of the Board of Tax Appeals and based its opinion on the proposition that to be a reorganization within the meaning of the statute there had to be a merger or a consolidation. While the *Pinellas* case was under consideration in the Fifth Circuit, the *Cortland Specialty Co.* case went to the Circuit Court of Appeals for the Second Circuit, where the decision of the Board was affirmed[3] on the ground that the transaction was a sale and not an exchange for securities. In its opinion, the Circuit Court of Appeals said that the provisions which postponed discussion of gain in cases of exchanges under reorganizations, contemplated a "continuity of interest", and that the short-term notes received by the seller did not give it a continuity of interest in the business which had been sold. It would seem that the court was not concerned (it had no reason to be) with the ratio of the seller's interest to the total investment in the properties and obligations of the purchasing company. What the Circuit Court had in mind seems rather to have been that to obtain the benefit of the statute a party, whose stock or assets were turned over to another company, should have some or all of his consideration in the form of an investment *at the risk of the continuing business.* This would be consistent with the Congressional intent as reflected in the legislative history of the statutes.

This Court denied certiorari in the *Cortland Specialty Co.* case, but it reviewed the *Pinellas* case[4] and held that the transaction had been a sale, that the Circuit Court of Appeals was in error in giving no meaning whatever to

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[2] 57 Fed. (2) 188.
[3] 60 Fed. (2) 937.
[4] 287 U. S. 462.

the words embraced in parentheses in the statutory definition of "reorganization", and that there should be a "continuity of interest". This Court cited the *Cortland Specialty Co.* case and presumably had in mind the same thought which we submit must have been in the mind of the Circuit Court of Appeals—that a continuity of interest meant keeping an investment at the risk of the business.

This Court, however, in the *Pinellas* case, did say that to be a reorganization, even if not a merger or consolidation, a transfer should partake of the nature of a merger or consolidation. To what extent the assimilation should go was not stated by the Court. The Court certainly did not indicate that it would not regard as resembling a merger or consolidation the acquisition by one corporation of enough of the stock of the other to render them "affiliated" within the meaning of the statutory provisions for filing consolidated returns,[5] nor did it indicate that it would not regard as resembling a merger or consolidation the acquisition by one corporation of all the assets of another when the stockholders of the second company continued all or part of their investment at the risk of the business of the acquiring company, either through becoming stockholders or long-term bondholders thereof.

So far, all the litigated cases had dealt entirely with situations that were held by the Commissioner, the Board of Tax Appeals and the Courts to have been sales and not exchanges, the consideration in every instance being either all cash or involving notes of such short terms that they were regarded as the equivalent of cash rather than "securities," and which notes certainly did not contem-

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[5]Cf. Reg. 45 (1920 edition), art. 1567, which holds "reorganization" to include the acquisition by one corporation of enough stock of another to render them affiliated.

plate any protracted continuation of an investment of the selling company at the risk of the business of the purchasing company.

The next case to be litigated was that of the *Minnesota Tea Co.* In that case, *the assets of the Minnesota Tea Co.* were transferred to the Grand Union Co. in exchange for voting trust certificates representing 18,000 shares of the common stock of the Grand Union Co. plus some cash. The Minnesota Tea Co. distributed the cash among its stockholders but continued as a holding company owning the beneficial interest in 18,000 shares of the Grand Union Co. It thus clearly had a very substantial amount of its capital invested at the risk of the business of the Grand Union Co. and clearly had "a continuity of interest."

The Board of Tax Appeals fell into the type of error the danger of which Mr. Justice Cardozo pointed out in *Snyder* v. *Massachusetts.*[6]

The Board initiated the process of construing constructions and assumed that when the courts had referred to "continuity of interest", they had in mind the thought that to constitute such a continuity the investment must continue to be an investment in the old assets (undiluted

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[6] "'A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.'" (291 U. S. 97, 114.)

The Justice was discussing construction of the Constitution but his statement is equally applicable to construction of statutes.

by the other assets of the acquiring company), rather than an interest in the continuing corporation. The Board also assumed that clause "(A)" of the statute must be read in the light of clause "(B)", overlooking the fact that clause "(A)" was carried forward from a preceding statute and clause "(B)" was added with the express intent of taking care of a type of cases not covered by clause "(A)" in the earlier law.

Although the Commissioner of Internal Revenue had held that the transaction was a reorganization, and the case had been presented to the Board by both parties on that theory, the Board, of its own motion, raised the question and held that there was no reorganization within the meaning of the statute.

It is interesting to note that among the dissents from Mr. Sternhagen's opinion in the *Pinellas* case was one by Mr. Van Fossan who decided the *Watts* case, and that Mr. Sternhagen disagreed with the *ratio decidendi* in the *Watts* case.

While the Board's opinion in the *Minnesota Tea Co.* case was being prepared, another division of the Board decided the *John A. Nelson Co.* case. Although the Illinois corporation transferred all its assets except $100,000 cash (which constituted less than three per cent of its assets) to the Delaware corporation for all of the latter's preferred stock plus some cash, and although the parties stipulated before the Board that this transaction constituted a reorganization within the meaning of the statute, the Board rejected the stipulation and held that there was no reorganization because the petitioner did not transfer all its stock, nor come within the provisions of clause "B" of the statute by acquiring a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of the Delaware corporation. The

Board stressed the fact that in the agreement between the companies the words "sale and transfer" were used, but overlooked the fact that in the corporate resolutions the word "reorganization" was also used.

The *Watts* case involved a transaction coming under the second part of the parenthetical matter of the statute. The Vanadium Co. acquired all the stock of the Ferro Alloys Corporation, and the stockholders of the Ferro Alloys Corporation received in exchange therefor certain stock of the Vanadium Co. and bonds of the Ferro Alloys Corporation guaranteed by the Vanadium Co. The Board seized upon some phraseology from the *Cortland Specialty Co.* decision of the Circuit Court of Appeals, which had been written with respect to an entirely different situation, and fitting it to the problem before it, held that there was no reorganization because there was no new or modified corporate structure, the corporate structure of the Vanadium Co. continuing unchanged. The Board, of course, overlooked the fact that the corporate structure of the Vanadium Co. *was* substantially changed in the process of its becoming a holding company—holding the stock of Ferro Alloys Corporation, which continued to operate as a subsidiary. The Circuit Court of Appeals, in referring to new or modified corporate structure, was referring to the necessity of continuity of investment, not to the necessity of a change in corporate structure. But the Board, in its effort to interpret interpretations, entirely lost sight of the language of the statute it was construing. In the same manner, the Board wrote into the statute a necessity for a dissolution of the acquiring company—which Congress never contemplated, as is pointed out in several of the other briefs before this Court.

The *G & K Mfg. Co.* case was decided on April 16, 1934, in an unpublished memorandum. (R. 49, No. 187.)

In that case, all of the asets of the Gelfand Mfg. Co. were transferred to the Kraft-Phenix Cheese Corporation for 17,250 shares of the common stock of the latter plus certain cash. The Board thought that because it could not determine the extent of the continuing interest (apparently thinking of interest as control rather than as investment at risk of the business), and because neither corporation was dissolved, the case came within its decision in the *Minnesota Tea Co.* case, and held that there was no reorganization.

The four Board decisions were taken to four different Circuit Courts of Appeals. In the *Minnesota Tea Co.* case (Eighth Circuit) and the *Watts* case (Second Circuit), the Circuit Courts of Appeals reversed the Board and held that the statute meant what it said. In the *Nelson* case (Seventh Circuit) and the *G & K Mfg. Co.* case (Fourth Circuit), the Circuit Courts of Appeals continued the process of interpreting interpretations. The other briefs on file in the various cases discuss these opinions at such length that we will not burden this Court with further reference to them.

II.

MEANING OF "SECURITIES".

Certainly, when Congress wrote into the statute "stock or securities" it meant more than "stock or stock rights". It is submitted that "securities" was used in the ordinary meaning of the term and included bonds, debentures, long-term collateral notes and other obligations of the nature that are ordinarily classified by accountants among fixed liabilities, as distinguished from current liabilities on the part of the obligor, and which are regarded as investments, rather than the equivalent

of cash, on the part of the obligees. This distinction reconciles the decision of the Circuit Court of Appeals for the Second Circuit in the *Cortland Specialty Co.* case with its decision in the *Watts* case. In the former, the obligations involved were a series of short-term notes; in the latter, (in addition to stock) they consisted of a block of mortgage bonds of Ferro Alloys Corporation guaranteed by the Vanadium Co.

There is an apparent conflict between the decision of the Circuit Court of Appeals for the Second Circuit in *Worcester Salt Co.*, 75 Fed. (2) 251, and its decision in the *Watts* case on the clasification of bonds. After the opinion was rendered in the *Watts* case, the Government moved for a reconsideration on the ground of this conflict and the motion was denied. The net effect of the action of the court in denying the motion was to overrule its earlier decision in the *Worcester Salt* case in so far as it was in conflict with the *Watts* case.

There is no reason why Congress should be presumed to have meant by the word "securities" in the reorganization sections of the statutes, something different from what it meant when it used the word "securities" in other parts of the Revenue Acts or in other statutes, or something different from what the Treasury Department has meant by "securities" in its regulations and rulings. In the Appendix are listed a number of places where the word "securities" will be found in other parts of the Revenue Acts, in Treasury Regulations and rulings, and in other Federal statutes, in such a way that there can be no question that it was intended to include corporation bonds.

Respectfully submitted,

Of Counsel:
BREWSTER, IVINS & PHILLIPS.

J. S. Y. IVINS,
Amicus Curiae.

APPENDIX

Provisions (other than the provisions under consideration in the reorganization cases) of Revenue Acts where the word "securities" is used—obviously including bonds of corporations:

Revenue Act of 1917, section 1200, amending Revenue Act of 1916, section 4: "securities issued under the provisions of the Federal Farm Loan Act."

Similarly, Revenue Acts of 1918, 1921, 1924 and 1926, section 213(b) (4); Revenue Acts of 1928 and 1932, section 22(b) (4); Revenue Acts of 1924 and 1926, section 204(a) (11), dealing with property received in place of stock or "securities".

Similarly, Revenue Acts of 1928 and 1932, section 113 (a) (11), and Revenue Act of 1934, section 113(a) (10). Revenue Acts of 1921, 1924 and 1926, section 214(a) (5), section 234(a) (4), dealing with wash sales of stock or securities. Similarly, Revenue Acts of 1928, 1932 and 1934, section 118.

Treasury Regulations (other than those dealing with exchanges on reorganization) where the word "securities" is used—obviously including bonds of corporations:

Regulations 45 (1918 law), article 154: "*Worthless Securities.*—Where bonds purchased before 1913 depreciated in value * * *."

Similarly, in Regulations 62 (1921), Regulations 65 (1924), Regulations 69 (1926)—article 154, the same language is used, and later, "A taxpayer (other than a dealer in securities) possessing debts evidenced by bonds or other similar obligations * * *."

Similarly, Regulations 74 (1928), Regulations 77 (1932), article 194; Regulations 86 (1934), article 23 (k)-4.

Regulations 62, article 147: "Losses from the sale and repurchase of securities.—An individual, other than one in the trade or business of buying and selling securities, cannot deduct any loss claimed to have been sustained from the sale or other disposition of stock or securities, if within thirty days before or after the date of such sale or other disposition he has acquired * * * substantially identical property."

Similarly, Regulations 65 and Regulations 69, article 146; Regulations 74, article 661. Also Regulations 77, article 661, where title is changed to: "Losses from Wash Sales of Stocks or Securities." Regulations 86, article 118-1, also Regulations 65 and 69, article 1601; Regulations 74 and 77, article 602.

Regulations 33, Revised (1916-17), article 4, paragraph 27, dealing with dividends paid with securities.

Treasury Rulings in which bonds are treated as "securities":

I. T. 1356, I-1 C. B. 151, holding Liberty bonds within statutory provision respecting wash sales of securities, says: "Important features of securities are their earning power or interest rate * * * in the case of bonds, the date of maturity."

I. T. 1239, I-1 C. B. 149, held that profit on sale of Liberty bonds was taxable as profit "derived from the sale of securities."

Federal statutes, other than Revenue Acts, where the word "securities" is used in a sense obviously including bonds:

U. S. Code, section 303b: "The term 'securities' shall include bonds, notes, and other evidence of indebtedness * * *." (Bankruptcy.)

U. S. Code, Title 12, sections 377 and 378: "• • • stocks, bonds, debentures, notes, or other securities • • •." (Banking.)

U. S. Code, Title 12, section 615a: "• • • securities, including the obligations of the United States or of any state." (Obligations of the United States or of any State.)

U. S. Code, Title 15, section 77b, defining securities, and section 78c, 78t(c) and 78dd, applying definition. (Securities Act of 1933.)

U. S. Code, Title 18, section 262: "obligation or other security of the United States." (Criminal Code.)

U. S. Code, Title 18, section 270: "Any bond, certificate, obligation or other security of any foreign government." (Criminal Code.)

U. S. Code, Title 18, section 414. A very broad definition of "securities" in criminal code.

U. S. Code, Title 47, section 212, prohibiting officials of telephone and telegraph companies from benefiting from the sale of "any securities issued or to be issued" by their companies.

U. S. Code, Title 49, section 19a, defining powers of Interstate Commerce Commission to investigate "increases or decreases of stock, bonds or other securities in any reorganization" of interstate carriers.

U. S. Code, Title 49, section 20a(2): "It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the owner (hereinafter in this section collectively termed 'securities') • • •."

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 175

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

E. C. PETERSON

No. 176

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

L. T. PETERSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 175

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

E. C. PETERSON

No. 176

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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A Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the March Term, 1935, of said court, before the Honorable John B. Sanborn, the Honorable Joseph W. Woodrough, and the Honorable Wilbur F. Booth, Circuit Judges.

[Caption omitted.]

1 Before United States Board of Tax Appeals

Docket No. 60837

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order extending time to file record to May 15, 1934

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby, extended to May 15, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., April 5, 1934.

Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

No. 60837

Order further extending time to file record to July 2, 1934

For cause appearing of record, it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby, extended to July 2, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., May 15, 1934.

2 Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before United States Board of Tax Appeals

Docket No. 60839

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order extending time to file record to May 15, 1934

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby extended to May 15, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., April 5, 1934.

Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

No. 60839

Order further extending time to file record to July 2, 1934

For cause appearing of record, it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby, extended to July 2, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., May 15, 1934.

3 Now, June 4, 1934, the foregoing order certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

Docket entries in case no. 60837

[Title omitted.]

Appearances: For taxpayer—J. Marvin Hayes, Esq. (withdrawn), W. C. Magathan, Esq., C. J. McGuire, Esq. (withdrawn), Oscar Mitchell, Esq.; for Comm'r.—E. L. Corbin, Esq., Prew Savoy, Esq.

1931
Dec. 12—Petition received and filed. Taxpayer notified. (Fee paid.)
" 14—Copy of petition served on General Counsel.
1932
Feb. 6—Answer filed by General Counsel.
" 13—Copy of answer served on taxpayer, assigned to General Counsel.
Mar. 29—Motion to strike answer filed by taxpayer.
Apr. 5—Hearing set April 20, 1932 on motion.
" 5—Copy of notice of hearing date and motion served on General Counsel.
" 20—Hearing had before Mr. Van Fossan, Div. 9. Petitioner's motion to strike, granted. Exception to respondent.
" 20—Order granting motion and that proceeding remain in General Calendar entered. Exception of respondent noted.
Aug. 13—Hearing set 10/12/32.
Sept. 19—Motion to consolidate with dockets 60838 and 39 for hearing 10/12/32 filed by taxpayer. 9/21/32 granted.

4 Oct. 12—Hearing had before J. M. Sternhagen, Div. 10. Submitted on the merits. Stipulation of facts and exhibits filed. Briefs due Nov. 22, 1932. Replies Dec. 1, 1932. Exchange by counsel.
" 19—Transcript of hearing of 10/12/32 filed.
Nov. 22—Brief filed by taxpayer. 11/25/32 copy served. Twenty printed copies received 12/5/32.
" 22—Brief filed by General Counsel.
" 30—Motion for extension of 10 days to file reply brief filed by taxpayer. Granted.
Dec. 12—Reply brief filed by taxpayer. Twenty printed copies received 12/19/32.

1933
May 27—Supplemental brief filed by taxpayer.
June 2—Memorandum filed by General Counsel.
" 30—Opinion rendered, J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.
Nov. 16—Notice of settlement filed by General Counsel.
" 20—Hearing set Dec. 13, 1933, under Rule 50.
Dec. 11—Consent to settlement filed by taxpayer.
" 18—Judgment entered, Div. 10.
1934
Feb. 5—Notice of withdrawal of J. Marvin Haynes and C. J. McGuire and appearance of Oscar Mitchell as counsel for taxpayer filed.
" 5—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.
Feb. 5—Proof of service of petition for review filed.
Mar. 10—Praecipe with proof of service thereon filed by taxpayer.
Apr. 5—Order enlarging time to May 15, 1934, for transmission and delivery of record sur petition for review entered.
May 15—Order enlarging time to July 2, 1934, for transmission and delivery of record sur petition for review entered.

5 Before U. S. Board of Tax Appeals

Docket entries in case no. 60839.

[Title omitted.]
Appearances: For taxpayer.—J. M. Haynes (withdrawn), W. C. Magathan, Esq., C. J. McGuire (withdrawn), Oscar Mitchell, Esq.; for Comm'r.—E. L. Corbin, Esq., Prew Savoy, Esq.
1931
Dec. 12—Petition received and filed. Taxpayer notified. (Fee paid.)
" 14—Copy of petition served on General Counsel.
1932
Feb. 6—Answer filed by General Counsel.
" 13—Copy of answer served on taxpayer, assigned to General Calendar.
Mar. 29—Motion to strike answer filed by taxpayer.
Apr. 5—Hearing set April 20, 1932 on motion.
" 5—Copy of notice of hearing date and motion served on General Counsel.
" 20—Hearing had before Mr. Van Fossan, Div. 9 on petitioner's motion to strike answer—granted. Exception to respondent.
" 20—Order granting motion to strike and proceeding to remain on General Calendar entered.
Aug. 13—Hearing set Oct. 12, 1932.
Sep. 19—Motion to consolidate with dockets 60837 and 38 for hearing 10/12/32 filed by taxpayer 9/21/32 granted.
Oct. 12—Hearing had before J. M. Sternhagen, Div. 10. Submitted on merits. Stipulation of facts and exhibits filed. Briefs due Nov. 22, 1932. Replies due Dec. 1, 1932. Exchange by counsel.
" 19—Transcript of hearing 10/12/32 filed.

Nov. 22—Brief filed by taxpayer. 11/25/32 copy served. 20 printed copies received 12/5/32.
" 22—Brief filed by General Counsel.
6 " 30—Motion for extension of 10 days to file reply brief filed by taxpayer. Granted.
Dec. 12—Reply brief filed by taxpayer. 20 copies received 12/19/32.
1933
May 27—Supplemental brief filed by taxpayer.
Jun. 2—Memorandum filed by General Counsel.
" 30—Opinion rendered, Mr. J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.
Nov. 16—Notice of settlement filed by General Counsel.
" 20—Hearing set Dec. 13, 1933 under Rule 50.
Dec. 11—Consent to settlement filed by taxpayer.
" 18—Judgment entered, Div. 10.
1934
Feb. 5—Notice of withdrawal of J. Marvin Haynes and C. J. McGuire and appearance of Oscar Mitchell as counsel for tax payer filed.
" 5—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.
" 5—Proof of service of petition for review filed.
Mar. 10—Praecipe with proof of service thereon filed by taxpayer.
Apr. 5—Order enlarging time to May 15, 1934 for transmission and delivery of record sur petition for review entered.
May 15—Order enlarging time to July 2, 1934 for transmission and delivery of recordjsur petition for review entered.

United States Board of Tax Appeals

Petition of E. C. Peterson for appeal in case no. 60837

Filed December 12, 1931

[Title omitted.]

7 The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-1; GFG-60D) dated October 20, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 2215 East Second Street, Duluth, Minnesota.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 20, 1931.

3. The taxes in controversy are income taxes for the year 1928 and in the amount of $15,982.31.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The respondent has overstated by $97,596.36 the amount of dividends received from Minnesota Tea Company out of its earnings or profits.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1928, the petitioner owned 702 shares of the capital stock of Minnesota Tea Company, out of a total issued capital stock of 1,517 shares. These shares were acquired more than two years prior to August 23, 1928.

(b) On August 23, 1928, in pursuance of a plan of reorganization, Minnesota Tea Company transferred all of its assets to Grand Union Company and received in exchange therefor 18,000 shares of common stock of said Grand Union Company plus $426,842.52 in cash.

(c) The basis to Minnesota Tea Company of the assets transferred to Grand Union Company was $254,646.62.

(d) The contract under which the stock of Grand Union Company was received by Minnesota Tea Company provided that only one-fifth of the stock received could be sold in each year for a period of five years. None of this stock has been sold.

(e) The stock of Grand Union Company received by Minnesota Tea Company had no fair market value when received.

(f) In pursance of the plan of reorganization, Minnesota
8 Tea Company immediately upon the receipt of the said cash in the amount of $426,842.52 distributed it to its stockholders subject to liabilities in the amount of $106,471.73 which the stockholders assumed in proportion to their stockholdings. The amount received by the petitioner less of the amount of liabilities assumed and paid by the petitioner was $148,235.56.

(g) At the time of the said cash distribution the undistributed earnings or profits of Minnesota Tea Company amounted to $109,442.83.

(h) The respondent has determined that the entire said distribution received amounting to $148,235.56 was made out of earnings or profits of Minnesota Tea Company and has accordingly taxed the entire distribution as a dividend.

(i) At the time of the said cash distribution the basis of the Minnesota Tea Company stock owned by the petitioner was $59,376.78.

6. Wherefore, the petitioner prays that this Board may hear the proceeding and (a) determine that of the distribution of $148,235.56 received from Minnesota Tea Company only $50,639.20 is taxable as a dividend and that the balance of the distribution should be applied against the basis of the stock, (b) afford such further relief as the nature of the case may require and to the Board may seem equitable and proper.

J. MARVIN HAYNES,
Counsel for Petitioner,
916 Investment Building, Washington, D. C.

Of counsel:
LYBRAND, ROSS BROS. & MONTGOMERY.
C. J. MCGUIRE.
W. C. MAGATHAN.

Dated November 16, 1931.

[*Duly sworn to by E. C. Peterson, jurat omitted in printing.*]

9 EXHIBIT "A" TO PETITION

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, October 20, 1931.

Mr. E. C. PETERSON,
2215 East Second Street, Duluth, Minnesota.

SIR: You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $15,982.31, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By (Sgd) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

10 STATEMENT

IT:AR:D-1
GFG-60D
In re: Mr. E. C. PETERSON, *2215 East Second Street, Duluth, Minnesota.*

TAX LIABILITY

Year	Tax liability	Tax assessed	Deficiency
1928	$26,305.06	$10,322.75	$15,982.31

The report of the internal revenue agent in charge at St. Paul, Minnesota, covering an examination of your income tax liability for the year 1928 has as the result of the conference held in your behalf in this office January 23, 1931, been revised to show the above deficiency.

Your tax liability is determined as follows:

Net income reported on return		$58,395.84
Add:		
1. Dividends		148,235.56
Total		$206,631.40
Deduct:		
2. Other income reduced		42,766.86
Net income as adjusted		$163,864.54
Capital net gain reported on return		$47,206.55
Deduct:		
3. Gain from stock redeemed reduced		34,329.73
Capital net gain as adjusted		$12,876.82

COMPUTATION OF TAX

Total net income adjusted		$176,741.36
Less:		
Capital net gain included		12,876.82
Ordinary net income adjusted		$163,864.54
Brought forward		$163,864.54
Less:		
Dividends	$150,066.56	
Personal exemption and credit for dependents	4,700.00	
		154,766.56
Net income subject to normal tax		9,097.98
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $1,097.98		54.90
Surtax on $163,864.54		24,432.91
Tax at 12½% on $12,876.82		1,609.60
Total		$26,277.41
Less:		
Earned income credit		72.35
Total tax liability		$26,205.06
Tax previously assessed		10,222.75
Deficiency		$15,982.31

EXPLANATION OF CHANGES

1. This item was fully explained by the revenue agent. You are advised that careful consideration has been given the information furnished in your protest and at the conferences held in your behalf relative to the taxability of your proportionate share of the cash received by you from the Minnesota Tea Company. In this connection you are advised that in the absence of any authorities contrary to the position heretofore taken this office is of the opinion that the inhibition against recognition of gain contained in section 112 (d) (1) of the Revenue Act of 1928 should be limited in its application to cases where the income tax liability of the transferor corporation is involved and that for the purpose of determining the true nature of the distribution by the transferor corporation to its stockholders, the actual gain realized by said corporation should be reflected on its books.

2. This item was fully explained by the revenue agent.

3. This office concedes the March 1, 1913, value of the good will of the Minnesota Tea Company to be $20,000.00 and the total value of the stock to be $144,675.00. In the absence of market values of the stocks of the Minnesota Tea Company and Peterson Investment Company the following basic cost of each as submitted in your protest has been accepted:

	Amount	Percent
Minnesota Tea Company:		
Assets	$1,019,738.20	
Liabilities	106,471.73	
Net assets	$913,266.47	88.7
Peterson Investment Company: Net assets	116,313.35	11.3
	$1,029,579.82	100.0

12 The allocation of the basis is:

	Percent	Amount
Minnesota Tea Company	88.7	$128,326.73
Peterson Investment Company	11.3	16,348.27
	100.0	$144,675.00

Cost per share Minnesota Tea Company stock (1,517 shares costing $128,326.73) is $150.51

Cost per share Peterson Investment Company stock (1,137.75 shares costing $16,348.27) is 14.37

Stockholdings in Minnesota Tea Company were as follows:

E. C. Peterson	702 shares	46.27%
L. T. Peterson	702 shares	46.27%
A. F. Peterson	113 shares	7.46%
	1,517 shares	100.00

In Peterson Investment Company:

E. C. Peterson	526.5 shares
L. T. Peterson	526.5 shares
A. F. Peterson	84.75 shares
	1,137.75

Gain realized on partial liquidation Peterson Investment Company.

226 shares turned in at par value of $22,600.00 cash value of liability	Total	E. C. Peterson 46.27%	L. T. Peterson 46.27%	A. F. Peterson 7.46%
Cost of stock at $14.37 per share	$22,600.00 4,670.78	$14,027.73 2,160.60	$14,027.73 2,160.92	$2,434.50 348.40
Taxable gain	$27,829.78	$12,676.83	$12,676.83	$2,076.10

Inasmuch as you reported a profit of $47,206.55 from this transaction instead of $12,867.82 the difference is $34,329.73.

Consent which will expire December 31, 1931, except as extended by the provisions of section 277 of the Revenue Act of 1928 is on file for the year 1928.

A copy of this letter, together with a copy of the statement and schedules, has been mailed to your representatives, Mr. C. J. McGuire and Mr. W. H. Davidson, Investment Building, Washington, D. C., in accordance with the authority conferred upon it in the power of attorney executed by you and on file with the Bureau.

13 Before United States Board of Tax Appeals

Answer of Commissioner of Internal Revenue in case no. 60837

Filed February 6, 1932

[Title omitted.]

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits and denies as follows, to wit:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. (a) Admits that the petitioner owned 702 shares of the common stock of the Minnesota Tea Company during the year 1928, as alleged in paragraph 5 (a) of the petition, but denies all other allegations contained in said paragraph.

(b) Denies the allegations contained in paragraph 5 (b) of the petition.

(c), (d), and (e). Denies the allegations contained in subparagraphs (c), (d), and (e) of paragraph 5 of the petition.

(f) Admits that the petitioner received $148,235.56, as alleged in subparagraph (f) of paragraph 5 of the petition, but denies all other allegations contained in said paragraph.

(g) Denies the allegations contained in paragraph 5 (b) of the petition.

(h) Denies the allegations contained in paragraph 5 (h) of the petition.

(i) Denies the allegations contained in paragraph 5 (i) of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that that Board redetermine the amount of the deficiency involved in this proceeding to be equal
14 to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner.

Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
ALLIN H. PIERCE,
IRVING M. TULLAR,
Special Attorneys, Bureau of Internal Revenue.

Before United States Board of Tax Appeals, Washington

Order striking certain words from answer in case no. 60837

[Title omitted.]

This proceeding having been called from the Day Calendar of April 20, 1932, on motion of counsel for the petitioner that the following words be stricken from the final paragraph of the answer in the above-entitled proceeding:

"* * * plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination."

and due consideration having been given said motion, it hereby is

Ordered that the motion be and hereby is granted and that the proceeding remain on the General Calendar for hearing in due course.

(Signed) ERNEST H. VAN FOSSAN,
Member.

15 Counsel for the respondent excepts to the foregoing, and at his instance, exception is noted.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Dated, April 20, 1932.

A true copy.
Teste:

B. D. GAMBLE,
[SEAL] *Clerk of U. S. Board of Tax Appeals.*

Before United States Board of Tax Appeals

Petition of L. T. Peterson for appeal in case no. 60839

Filed December 12, 1931

[Title omitted.]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal

Revenue in his notice of deficiency (IT:AR:D–1; GFG–60D) dated October 20, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 2505 East Second Street, Duluth, Minnesota.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 20, 1931.

3. The taxes in controversy are income taxes for the year 1928 and in the amount of $15,974.76.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The respondent has overstated by $97,596.36 the amount of dividends received from Minnesota Tea Company out of its earnings or profits.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1928 the petitioner owned 702 shares
16 of the capital stock of Minnesota Tea Company, out of a total issued capital stock of 1,517 shares. These shares were acquired more than two years prior to August 23, 1928.

(b) On August 23, 1928, in pursuance of a plan of reorganization, Minnesota Tea Company transferred all of its assets to Grand Union Company and received in exchange therefor 18,000 shares of common stock of said Grand Union Company plus $426,842.52 in cash.

(c) The basis to Minnesota Tea Company of the assets transferred to Grand Union Company was $254,646.62.

(d) The contract under which the stock of Grand Union Company was received by Minnesota Tea Company provided that only one-fifth of the stock received could be sold in each year for a period of five years. None of this stock has been sold.

(e) The stock of Grand Union Company received by Minnesota Tea Company had no fair market value when received.

(f) In pursuance of the plan of reorganization, Minnesota Tea Company, immediately upon the receipt of the said cash in the amount of $426,842.52, distributed it to its stockholders, subject to liabilities in the amount of $106,471.73, which the stockholders assumed in proportion to their stock holdings. The amount received by the petitioner, less the amount of liabilities assumed and paid by the petitioner, was $148,235.56.

(g) At the time of the said cash distribution the undistributed earnings or profits of Minnesota Tea Company amounted to $109,442.83.

(h) The respondent has determined that the entire said distribution received, amounting to $148,235.56, was made out of earnings or profits of Minnesota Tea Company and has accordingly taxed the entire distribution as a dividend.

(i) At the time of the said cash distribution the basis of the Minnesota Tea Company stock owned by the petitioner was $59,376.78.

6. Wherefore the petitioner prays that this Board may hear the proceeding and (a) determine that of the distribution of $148,235.56

received from Minnesota Tea Company only $50,639.20 is taxable as a dividend and that the balance of the distribution should be applied against the basis of the stock, (b) afford such further relief as
17 the nature of the case may require and to the Board may seem equitable and proper.

J. MARVIN HAYNES,
Counsel for Petitioner,
916 Investment Building, Washington, D. C.

Of counsel:
LYBRAND, ROSS BROS. & MONTGOMERY.
C. J. MCGUIRE.
W. C. MAGATHAN.

Dated November 16, 1931

[*Duly sworn to by L. T. Peterson jurat omitted in printing.*]

EXHIBIT "A" TO PETITION

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, October 20, 1931.

MR. L. T. PETERSON,
2505 East Second Street, Duluth, Minnesota.

SIR: You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $15,974.76, as shown in the statement attached.

18 In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. Wilmer (Signed.)
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

STATEMENT

IT:AR:D-1
GFG-60D

In re: Mr. L. T. PETERSON,
2505 East Second Street, Duluth, Minnesota.

TAX LIABILITY

Year	Tax liability	Tax assessed	Deficiency
1928	$26,181.49	$10,206.73	$15,974.76

The report of the internal revenue agent in charge at St. Paul, Minnesota, covering an examination of your income tax liability for the year 1928 has as the result of the conference held in your behalf in this office January 23, 1931, been advised to show the above deficiency.

19 Your tax liability is determined as follows:

Net income reported on return		$158,244.49
Add:		
1. Dividends		148,235.56
Total		206,480.05
Deduct:		
2. Other income reduced		42,766.85
Net income as adjusted		$163,713.20
Capital net gain reported on return		$47,206.55
Deduct:		
3. Gain from stock redeemed reduced		34,329.72
Capital net gain as adjusted		$12,876.83

COMPUTATION OF TAX

Total net income adjusted		$176,590.03
Less:		
Capital net gain included		12,876.83
Ordinary net income adjusted		$163,713.20
Less:		
Dividends	$150,136.56	
Personal exemption and credit for dependents	4,300.00	
		154,436.56
Net income subject to normal tax		39,276.64
Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $1,276.64		63.83
Surtax on $163,713.20		24,402.64
Tax at 12½% on $12,876.83		1,609.60
Total		26,256.07
Less:		
Earned income credit		74.58
Tax liability		26,181.49
Tax previously assessed		10,206.73
Deficiency of tax		$15,974.76

EXPLANATION OF CHANGES

1. This item was fully explained by the revenue agent. You are advised that careful consideration has been given the information furnished in your protest and at the conferences held in your behalf relative to the taxability of your proportionate share of the cash received by you from the Minnesota Tea Company. In this connection you are advised that in the absence of any authorities contrary to the position heretofore taken this office is of the opinion that the inhibition against recognition of gain contained in section 112 (d) (1) of the Revenue Act of 1928 should be limited in its application to cases where the income tax liability of the transferor corporation is involved and that for the purpose of determining the true nature of the distribution by the transferor corporation to its stockholders, the actual gain realized by said corporation should be reflected on its books.

2. This item was fully explained by the revenue agent.

3. This office concedes the March 1, 1913, value of the good will of the Minnesota Tea Company to be $20,000.00 and the total value of the stock to be $144,675.00. In the absence of market values of the stock of the Minnesota Tea Company and Peterson Investment Company the following basic cost of each as submitted in your protest has been accepted.

	Amount	Percent
Minnesota Tea Company:		
Assets	$1,019,739.20	
Liabilities	106,471.73	
Net assets	$913,266.47	88.7
Peterson Investment Company: Net assets	116,313.35	11.3
	$1,029,579.82	100.0

The allocation of the basis is:

	Percent	Amount
Minnesota Tea Company	88.7	$128,326.73
Peterson Investment Company	11.3	16,348.27
	100.0	$144,675.00

Cost per share Minnesota Tea Company stock (1,517 shares costing $128,326.73) is $150.51

Cost per share Peterson Investment Company stock (1,137.75 shares costing $16,348.27) is 14.37

Stockholdings in Minnesota Tea Company were as follows:

E. C. Peterson	702 shares	46.27%
L. T. Peterson	702 shares	46.27%
A. F. Peterson	113 shares	7.46%
	1,517 shares	100.00%

21 In Peterson Investment Company:

E. C. Peterson	526.5 shares
L. T. Peterson	526.5 shares
A. F. Peterson	84.75 shares
	1,137.75 shares

Gain realized on partial liquidation Peterson Investment Company.

325 shares turned in at par value of $32,500 cash value of liability	Total	E. C. Peterson 46.27%	L. T. Peterson 46.27%	A. F. Peterson 7.46%
Cost of stock at $14.37 per share	$32,500.00	$15,037.75	$15,037.75	$2,424.50
	4,670.25	2,160.93	2,160.92	348.40
Taxable gain	27,829.75	12,876.82	12,876.83	2,076.10

Inasmuch as you reported a profit of $47,206.55 from this transaction instead of $12,876.83 the difference is $34,329.72.

Consent which will expire December 31, 1931, except as extended by the provisions of section 277 of the Revenue Act of 1928 is on file for the year 1928.

A copy of this letter, together with a copy of the statement and schedules, has been mailed to your representatives, Mr. C. J. McGuire and Mr. W. H. Davidson, Investment Building, Washington, D. C., in accordance with the authority conferred upon them in the power of attorney executed by you and on file with the Bureau.

Before United States Board of Tax Appeals

[Title omitted.]

Answer of Commissioner of Internal Revenue in case no. 60839

Filed February 6, 1932

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits and denies as follows, to wit:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3.

22 4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5 (a) Admits that the petitioner owned 702 shares of the common stock of the Minnesota Tea Company during the year 1928, as alleged in paragraph 5 (a) of the petition, but denies all other allegations contained in said paragraph.

(b) Denies the allegations contained in paragraph 5 (b) of the petition.

(c), (d), (e). Denies the allegations contained in subparagraphs (c), (d), and (e) of paragraph 5 of the petition.

(f) Admits that the petitioner received $148,235.56, as alleged in subparagraph (f) of paragraph 5 of the petition but denies all other allegations contained in said paragraph.

(g) Denies the allegations contained in paragraph 5 (g) of the petition.

(h) Denies the allegations contained in paragraph 5 (h) of the petition.

(i) Denies the allegations contained in paragraph 5 (i) of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
ALLIN H. PIERCE,
IRVING M. TULLAR,
Special Attorneys, Bureau of Internal Revenue.

23 Before United States Board of Tax Appeals, Washington

[Title omitted.]

Order striking certain words from answer in case no. 60839

This proceeding having been called from the Day Calendar of April 20, 1932, on motion of counsel for the petitioner that the following words be stricken from the final paragraph of the answer in the above-entitled proceeding:

"* * * plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination."

and due consideration having been given said motion, it hereby is

Ordered that the motion be and hereby is granted and that the proceeding remain on the General Calendar for hearing in due course.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Counsel for the respondent excepts to the foregoing, and at his instance, exception noted.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Dated, April 20, 1932.

A true copy.
Teste:
[SEAL]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Agreed statement of facts in cases nos. 60837, 60838, and 60839

Filed Oct. 12, 1932

[Title omitted.]

24 It is hereby stipulated and agreed by and between E. C. Peterson, A. F. Peterson, and L. T. Peterson, petitioners, and the Commissioner of Internal Revenue, respondent, by their respective attorneys that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either or any party to these proceedings to introduce other and further evidence not at variance with the facts herein stipulated.

1. The petitioners herein are individuals residing at Duluth, Minnesota.

2. During the taxable year 1928 the petitioners owned the entire issued capital stock, 1,517 shares, of the Minnesota Tea Company, a corporation, and their respective shares were as follows:

E. C. Peterson	702 shares
A. F. Peterson	113 Do.
L. T. Peterson	702 Do.

These shares were acquired by the respective petitioners more than two years prior to August 23, 1928.

3. On August 23, 1928, the said Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of the common capital stock (represented by voting trust certificates) of said Grand Union Company, plus the sum of $426,842.52 in cash. No liabilities of Minnesota Tea Company were assumed by Grand Union Company.

4. The transfer effected as described in paragraph 3, immediately preceding, was accomplished in accordance with the following plan:

(a) On August 22, 1928, the stockholders of Minnesota Tea Company adopted a resolution, a copy of which is attached hereto, made a part hereof, and marked "Exhibit A."

(b) A copy of the option dated July 2, 1928, referred to in the aforedescribed resolution is attached hereto, made a part hereof, and marked "Exhibit B."

(c) On August 22, 1928, the Directors of Minnesota Tea Company adopted a resolution, a copy of which is attached hereto, made a part hereof, and marked "Exhibit C."

(d) On July 6, 1928, the option of July 2, 1928, was accepted by O. B. Westphal, Esq., who in all of the transactions with Minnesota Tea Company was acting as agent for Grand Union Company.

25 (e) On July 24, 1928, an agreement supplemental to the option of July 2, 1928, was accomplished, a copy of which is attached hereto, made a part hereof, and marked "Exhibit D."

(f) Also attached hereto and made a part hereof is a copy of the minutes of a stockholders' meeting held on August 23, 1928, marked "Exhibit E."

5. The basis to the Minnesota Tea Company of the assets so transferred to Grand Union Company, for computing gain or loss, was $254,646.62.

6. Minnesota Tea Company, immediately upon the receipt of the said cash in the amount of $426,842.52, paid this cash to its said stockholders, in proportion to their stockholdings, and at the time of said payment the said stockholders assumed, in proportion to their stockholdings, the liabilities of the said Minnesota Tea Company amounting to $106,471.73, and thereafter the stockholders duly discharged and paid said liabilities so assumed.

7. The said payment of the sum of $426,842.52 to the stockholders and their said assumption of the liabilities of the company were made pursuant to the following resolution adopted at a special meeting of the stockholders of the Minnesota Tea Company held on August 22, 1928:

"Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders, whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

26 8. The amounts of said payments to the respective stockholders, petitioners herein, and the amounts of the liabilities respectively assumed were as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,830.66	7,930.99	23,899.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	$426,842.52	$106,471.73	$320,370.79

9. At August 23, 1928, immediately prior to the said receipt by Minnesota Tea Company of said cash and stock of Grand Union Company, the undistributed earnings and profits of Minnesota Tea Company amounted to the sum of $109,442.83.

10. The said 18,000 shares of stock of Grand Union Company was received by Minnesota Tea Company under a contract dated July 2, 1926 (Exhibit B, attached). None of this stock has been sold.

11. Voting trust certificates for the common stock of said Grand Union Company have been listed on the New York Stock Exchange since June 2, 1928. During the week beginning August 19th and ending August 24, 1928, trust certificates for 42,700 shares of said common stock were traded in on said exchange. The sales prices on said exchange of such certificates and the number of such shares issued for the period from June 2, 1928, to August 31, 1932, were as follows:

Period	Common shares outstanding	Price range	
		High	Low
June 2 to August 18, 1928	220,000	30½	28¾
August 19 to 24, 1928	239,726	30¼	29¼
August 25 to December 31, 1928	239,726	41⅛	30⅛
1929	261,710	32⅜	9¼
1930	270,348	20¾	10
1931	270,348	18⅛	7
1932 to August 30th	277,667	9¾	3¼

12. The respective bases of the Minnesota Tea Company stock owned by the petitioners for the purpose of determining gain or loss on the sale or other disposition thereof were as follows:

E. C. Peterson	$59,376.78
A. F. Peterson	9,573.17
L. T. Peterson	59,376.78
	$128,326.73

27 13. If, of the net amount of $320,370.79 received by the stockholders, only $109,442.83 is considered to have been paid out of earnings or profits, the amount taxable to each petitioner as dividends and the amount taxable as capital gain is as follows:

Petitioner	Net receipts	Taxable as dividends	Return of capital	Basis of stock	Taxable as capital gain
E. C. Peterson	$149,256.56	$50,445.27	$97,360.29	$89,276.73	$28,313.51
A. F. Peterson	23,899.67	8,152.29	15,747.38	8,573.17	6,174.21
L. T. Peterson	148,223.56	50,445.27	97,360.29	89,276.73	28,313.51
	$320,370.79	$109,442.83	$210,927.96	$186,226.73	$62,801.23

14. The respondent determined that the entire amount of the net receipts by the petitioners in the aggregate amount of $320,370.79, as set forth in paragraphs 7 and 12 above, was a distribution out of earnings or profits and the deficiencies asserted are computed on the basis of taxing the entire amount of $320,370.79 as a dividend. If the Board so holds, the computations of the respondent are correct.

C. J. McGUIRE,
Attorney for Petitioner.
C. M. CHAREST,
General Counsel, Attorney for Respondent.

EXHIBIT "A"

Minutes of the special meeting of the stockholders of Minnesota Tea Company, held at its office in the City of Duluth, Minnesota, on the 22nd day of August, 1928, at ten o'clock in the forenoon.

Pursuant to the call of the president, a special meeting of the stockholders of the company was held at its offices, in the City of Duluth, Minn., on August 22nd, 1928, at ten o'clock in the forenoon, after all the stockholders in writing had mutually agreed and consented to the holding of such meeting and waived notice of the time and place and the purposes of such meeting required by the by-laws of the company and the statutes of the state.

All the stockholders were present during the meeting and participated therein and in the proceedings.

E. C. Peterson presided and A. F. Peterson acted as the secretary thereof.

28 The president reported to the meeting that it was advisable that all the assets of the company should be sold under the option dated July 2, 1928, given by the president and secretary to O. B. Westphal as modified by an agreement dated July 24th, 1928, upon the terms therein set out, except that, as the company has conveyed all its real estate, the lease specified in such option shall be made by Peterson Investment Company, the owner of the property, and further that it was advisable to distribute to the company's stockholders all the moneys received on such sale, whenever received by

the company, ratably according to their stockholdings, and that the stockholders should assume the corporate debts to enable it to hold all the corporate stock or securities received.

After a full discussion and consideration of the matters relating to such reorganization and in order to effect such reorganization by the sale of the company's assets for corporate securities or stock and moneys and the distribution of the moneys to the stockholders and the retention by the company of all the said stock and securities, a written resolution was read and its adoption moved, seconded and carried by the unanimous vote of all the stockholders. Such resolution was of words and tenor as follows:

"Resolved that the written option, dated July 2nd, 1928, and made by the President and Secretary of the company, in behalf of Minnesota Tea Company, to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying the said option, be and hereby are ratified, confirmed and approved, and that the actions of the President and Secretary in giving and executing such option and in signing and executing such agreement modifying said option be and are hereby in all things ratified, confirmed, and approved.

"Resolved further that the assets of Minnesota Tea Company described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee, in pursuance of and under such option and agreement modifying the same and on the terms therein stipulated and thereby agreed and for the consideration therein and thereby stipulated, or upon such other terms as may be deemed advisable by the board of directors, and that any other assets, if any there be, owned by, or in the disposition of, Minnesota Tea Company be
29 sold or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

"Resolved further that the Board of Directors be and hereby are authorized and directed to effect and make such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the considerations stipulated in said option and agreement modifying the same, or upon such other terms as the Board of Directors, or the president, by the board thereto authorized, may deem advisable.

"Resolved further that the Board of Directors, in order to effect such sale of said assets of this company, and to carry out the terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and are hereby authorized and directed to cause to be executed and delivered to the purchaser of said assets, in behalf of and by Minnesota Tea Company, any bill of sale, assignments, agreements, or other instruments by the president and the secretary and to cause Peterson Investment Company to execute the

lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

"Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent.

"Resolved further that Minnesota Tea Company shall continue to own and hold the said corporate stock and securities without the sale or distribution thereof."

It was then moved, seconded, and carried by the vote of the stockholders that the written consent to the holding of the special meeting and the waiver of notice of the holding thereof and the written resolution adopted at the meeting be copied into the minutes of the meeting and that said written consent and waiver and said written resolution adopted be filed with the files and records of the company.

The said written consent and waiver were of the following words and tenor:

We, the undersigned, being all the stockholders of Minnesota Tea Company, do hereby mutually consent to the holding of a special meeting of the stockholders of Minnesota Tea Company and its stockholders at the office of the corporation, in the City of Duluth, Minnesota, for any purpose, or purposes, that may affect the corporation and its business, as call by the President, and we waive any and every notice, or notices, of such meeting and of the purpose thereof required by the statutes of Minnesota or the By-Laws of the corporation.

Dated August 22, 1928.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

The meeting of the stockholders adjourned on motion made and carried.

(Signed) A. F. PETERSON,
Secretary.

Attest:

(Signed) E. C. PETERSON,
President.

The undersigned, being all the stockholders of Minnesota Tea Company do hereby certify that the foregoing minutes are true and correct.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

EXHIBIT "B"

DULUTH, MINN., *July 2, 1928.*

O. B. WESTPHAL, Esq.,
Chicago, Ill.

DEAR SIR: In consideration of $100, the receipt of which is hereby acknowledged, the undersigned corporation, organized and
31 existing under the laws of the State of Minnesota, having its principal office at No. 2023 West Superior Street, Duluth, Minnesota, grants to you an irrevocable option as follows:

First: This option shall extend for thirty days from date.

Second: The option may be exercised by notice in writing mailed or delivered to the undersigned by you within the period of the option.

Third: If the option is exercised within the time and in the manner hereinbefore provided, the undersigned shall thereupon be obligated to sell and you shall be obligated to purchase or cause to be purchased, subject to all of the conditions herein contained, the assets of the undersigned hereinafter described for the consideration hereinafter set forth.

Fourth: The assets referred to in Paragraph Third hereof shall consist of all of the assets owned by the undersigned upon the delivery date, of every kind and description other than real estate, buildings, fixtures, cash, the interest of the undersigned in any insurance policies upon the lives of any and all of its officers, and any bills, notes, accounts receivable which you and the undersigned shall consider doubtful and also other than insurance on buildings and fixtures, and including the goodwill and the right to use the name of the undersigned and including all trade marks and trade names.

Fifth: The consideration provided for in Paragraph Third hereof shall consist of the following:

(a) An amount in cash equal to the total value of the following:

(1) Inventories of merchandise and supplies at cost in place of the undersigned, or wholesale market value, whichever shall be lower;

(2) Bills, notes, and accounts receivable at face value, except that with respect to balance of premium accounts, 60% of the face value shall be taken;

(3) Furnishings and equipment at depreciated book value or at reproduction cost less depreciation, whichever shall be lower;

(4) And such an additional amount in cash for goodwill as, when added to the values of the property described in paragraphs
32 (1), (2), and (3) above, shall make the total consideration provided for in this subdivision (a) the sum of $400,000.

(b) Voting Trust Certificates for Eighteen Thousand (18,000) shares of fully paid and nonassessable Common Stock without par value of The Grand Union Company, a Delaware corporation.

In the event that Lybrand, Ross Brothers & Montgomery and the auditors of the undersigned shall be unable to agree upon the values of the property described in subdivisions (1), (2), and (3) of Paragraph Fifth herein, it is agreed between us that the determination of the value of said several items in subdivisions (1), (2), and (3) aforesaid as made by said Lybrand, Ross Brothers & Montgomery shall be final and binding upon us hereunder.

Sixth: It shall be a condition of the conveyance of the assets of the undersigned as hereinbefore provided that The Grand Union Company or one of its subsidiaries shall assume all contracts of the undersigned existing at the date hereof, and disclosed in writing to you before the date hereof, together with all contracts entered into by the undersigned between the date hereof and the date of delivery in the ordinary and usual conduct of the business for the purpose of merchandise for a period of not over ninety days, and together with all other contracts entered into by the undersigned with your approval between the date hereof and the delivery date. Further, the undersigned agrees not to enter into any contracts for chattels, machinery, or equipment during the period of this option without your consent in writing.

It shall be a further condition to the conveyance of the assets of the undersigned as hereinbefore provided that the total value of the assets conveyed of the kind described in subdivisions 1, 2, and 3 of clause (a) of Paragraph Fifth hereof (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be at least as great as the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927.

In the event the value of the total assets (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be less than the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927, the undersigned agrees to reduce the total purchase price in an amount equal to the difference between the total value of the assets on the date of
33 delivery and the total value of the assets (determined as in said Paragraph Fifth provided) owned by the undersigned on December 31, 1927.

In the event the value of the total assets (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be greater than the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927, then you shall agree to increase the total purchase price in an amount equal to the difference between the total value of the assets (determined as in said paragraph Fifth provided) owned by the undersigned on December 31, 1927.

It is further agreed by the undersigned that between the date hereof and the delivery date the undersigned will conduct its business in the normal and usual course and will not dispose of any assets or collect any accounts receivable other than in the normal conduct of the business.

Seventh. The delivery date shall be determined by you, provided that such delivery date shall be not less than ten and not more than forty-five days after the date of the exercise of the option, and provided further that you shall have given the undersigned at least five days' notice in writing of the delivery date. The place of delivery shall be at such place in New York City, N. Y., as you shall designate. Delivery shall be made by instruments of conveyance in form that are, or should be, satisfactory to your counsel running to a nominee to be named by you, upon payment of 90% of the cash purchase price of $400,000, payable under subdivision (a) of Paragraph Fifth hereof, and the delivery of the Voting Trust Certificates provided for in subdivision (b) of Paragraph Fifth hereof. Payment of the balance of the purchase price payable to the undersigned hereunder, or any refund of any excess payment which shall have been made, shall be made upon final determination as to any undisclosed liabilities of the undersigned not assumed by you hereunder, together with interest at the rate of 6% from the date of the delivery, such final determination to be made not later than thirty days after the delivery date. In the event that you shall be unable to make delivery of the Voting Trust Certificates provided for in subdivision (b) of Paragraph Fifth hereof because of any delay in listing the same upon the New York Stock Exchange, the time for the delivery of such Voting Trust Certificates may at your option be extended up to but not later than forty-five days after the delivery date hereinbefore provided for; it being understood, however, that you will use your best efforts to make delivery of the Voting Trust Certificates at the earliest possible date.

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Eighth. The undersigned further agrees to execute or to cause to be executed, as lessor, a lease for the term of five years from said delivery date, in form and with such provisions as are in common use in Minnesota, at a rental of $36,000 for said term, payable in monthly installments of $600.00 on the first day of each and every month during said term in advance, covering the following-described property in St. Louis County, Minnesota, to wit: The Southerly seventy (70) feet of lot numbered 332, on West First Street, Duluth Proper Second Division, according to the recorded plat thereof in the

office of the Register of Deeds for St. Louis County, Minnesota; and the two-story brick building and basement known as 2021 and 2023 West Superior Street, City of Duluth, Minnesota, except the store room, 20 x 60, known as 2021 West Superior Street; being the premises now used by the undersigned for warehouse and garage purposes; and you agree to cause such lease to be executed by The Grand Union Company or a subsidiary as lessee.

The undersigned further agrees that said lease shall contain an agreement which shall give to the lessee, or assigns, the exclusive right and option to take a lease of said premises for the additional term of five years, beginning at the termination of the lease provided for above, on the same terms and conditions as the first lease, except as hereinafter specified, provided that notice in writing of intention to exercise the option to take such additional lease shall be served upon the undersigned, its successors or assigns, being the record owners of said real estate at said time, at least three months prior to the termination of the five-year lease first hereinabove described. In the event that the lessee shall elect to exercise the option to take said additional lease, the rental to be paid for said premises for said term shall be such sum per annum as shall equal 10% of the value of said leased premises at the beginning of said second lease term, which rental shall be payable in equal monthly installments in advance on the first day of each month during said term. In the event that the lessee and the undersigned, or our respective successors or assigns, shall be unable to agree upon the value of said leased premises at said time, then the value of said leased premises shall be determined by arbitration by three arbitrators, one to be selected by the lessee, one to be selected by the undersigned or assigns; and the third by the two arbitrators so chosen. If any arbitrator provided for hereunder shall not be appointed or selected within a reasonable time, then either party or assigns, after reasonable notice to the other, may apply to any judge of the United States District Court for Minnesota for the appointment of such arbitrator or arbitrators, whose selection shall be binding upon the parties.

Ninth: The undersigned agrees simultaneously with the conveyance of assets herein provided to change its name to a name satisfactory to you, and it further agrees in consideration of the purchase of such assets that it will not hereafter engage in the wagon-route tea and coffee business in any part of the United States.

Tenth: The undersigned agrees that it will not, for a period of one year from the delivery date, dispose of any of the voting-trust certificates to be received by it as hereinbefore provided other than to its stockholders, and it further agrees that if it disposes of any of the same to any of its stockholders it will cause them at the time of the acquisition to enter into an agreement with The Grand Union Company agreeing that for such period they will not sell or otherwise dispose of any of the same to be acquired by them.

Eleventh: The undersigned agrees upon the delivery date to cause E. C. Peterson (hereinafter called "Employed" or included among

those called "Employed") to enter into an agreement for the employment of E. C. Peterson by The Grand Union Company or a subsidiary for the period of five years at a salary of eleven thousand ($11,000) dollars per annum, payable monthly, plus 3½% of the net profits after income taxes of the branch or branches which will be under the management of the Employed E. C. Peterson, and the undersigned further agrees upon the delivery date to cause L. T. Peterson (hereinafter called the "Employed" or included among those called "Employed") to enter into a like agreement for a period of five years at a salary of eleven thousand ($11,000) dollars per annum, payable monthly, plus 3½% of the net profits after income taxes of the branch or branches which will be under the management of the Employed L. T. Peterson, and the undersigned further agrees upon the delivery date to cause A. F. Peterson (hereinafter called the "Employed" or included among those called "Employed") to enter into a like agreement for the period of five years at a salary of
36 six thousand five hundred ($6,500.00) dollars per annum, payable monthly, plus 3% of the net profits after income taxes of the branch or branches which will be under the management of the Employed A. F. Peterson, such agreements to provide that the Employed will give all his time to the service of your company or a subsidiary and will not for a period of one year after the termination of his or their, as the case may be, employment, enter into any business in any part of the United States competitive with the business of The Grand Union Company or any of its subsidiaries, and such agreement or agreements to further provide that not more than 20% of the Voting Trust Certificates which shall be distributed to any one of the Employed by the undersigned shall be sold or otherwise disposed of by the Employed during any year after the first year of his employment. You agree upon the delivery date to cause The Grand Union Company or a subsidiary to enter into the above-described employment contracts.

Twelfth: The undersigned agrees throughout the pendency of this option to afford to you and your representatives access at all reasonable times to the books, records, accounts, and properties of the undersigned for the purpose of enabling you to acquire any information relative thereto which you may desire.

Thirteenth: Your obligation hereunder shall be subject—

(a) To your having exercised the option as hereinbefore provided, and

(b) That the undersigned shall have fully performed all the obligations and conditions hereunder to be performed by it prior to the payment hereunder, and that all requisite action shall have been taken by the undersigned for the purpose of validly conveying the assets as hereinbefore required, including compliance with any applicable Bulk Sales Laws, and that the bills of sales and any other instruments or assignments tendered hereunder are sufficient to vest you or your assigns with good and marketable title to all of the assets to be conveyed, and that the lease hereinbefore provided for is valid and

binding; all in such manner and form as shall be, or should be, satisfactory to your counsel; and that

(c) The undersigned shall not have suffered a loss on account of fires, flood, accident, or other calamity which in your opinion
37 substantially affects the conduct of its business, regardless whether the amount of such loss shall have been insured.

Fourteenth: All notices under this Agreement shall be in writing, and if to the undersigned shall be sufficient in all respects if delivered in person or sent by registered mail to the undersigned at 2023 West Superior Street, Duluth, Minnesota, and if to you shall be sufficient in all respects if delivered in person or sent by registered mail to you, Evanston Hotel, Evanston, Ill.

Yours very truly,

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President*.

Attest:
A. F. PETERSON,
Secretary.

EXHIBIT "C"

Minutes of the meeting of the Board of Directors of Minnesota Tea Company held on August 22, 1928, at two o'clock in the afternoon, pursuant to call of the President.

All the members of the Board of Directors were present and E. C. Peterson presided at the meeting and A. F. Peterson acted as Secretary.

The following written resolution was read, its adoption moved, seconded, and carried and adopted by the unanimous vote of the Directors:

"Whereas at a special meeting of the stockholders of Minnesota Tea Company, held at the office of the company, on August 22, 1928, at ten o'clock in the forenoon, the stockholders adopted a resolution in writing of the following words and tenor:

"Resolved that the written option, dated July 2, 1928, and made by the President and Secretary of the company, in behalf of Minnesota Tea Company to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying said option, be, and hereby are, ratified, confirmed, and approved, and that the actions of the President and Sec. ry in
38 giving and executing such option and in signing and executing such agreement modifying said option be, and are hereby, in all things, ratified, confirmed, and approved.

"Resolved Further that the assets of Minnesota Tea Company described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal or his nominee in pursuance of and under such option and agreement modifying the same and on the terms therein stipulated and

thereby agreed and stipulated, and upon such other terms as may be deemed advisable by the Board of Directors or by the President thereto authorized by the Board of Directors, and that any other assets, if any there be, owned by, or in the disposition of, Minnesota Tea Company, be sold, or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

"Resolved Further That the Board of Directors be, and hereby are, authorized and directed to effect and make such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the considerations stipulated in said option and agreement modifying same, or upon such other terms as the Board of Directors or the president, by the Board thereto authorized, may deem advisable.

"Resolved Further that the Board of Directors, in order to effect such sale of said assets of this company and to carry out the terms of said option as modified and of the terms of any agreement hereby authorized relative thereto be, and are hereby, authorized and directed to cause to be executed and delivered to the purchaser of said assets, in behalf of Minnesota Tea Company, any bill of sale, assignments, agreements, or other instruments by the President and the Secretary and to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

"Resolved Further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to
39 so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders, whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent.

"Resolved, Further, that Minnesota Tea Company shall continue to hold and own the said corporate stock and securities without the sale or distribution thereof.

"Therefore, resolved, that for the purpose of carrying out the plan of corporate reorganization adopted, authorized, and directed by the stockholders at their said meeting this day by the passing and adoption of the said resolution by them at their said meeting, the

written option, dated July 2, 1928, and made by the president and secretary of the company, in behalf of the Minnesota Tea Company, to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying the said option, be and hereby are ratified, confirmed, and approved, and the actions of the President and Secretary in giving and executing said option and agreement modifying the same are in all things ratified, confirmed, and approved, and that the assets of Minnesota Tea Company, described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee, in pursuance of and under said option and agreement modifying the same and on the terms therein stipulated and thereby agreed and for the considerations therein and thereby stipulated, or upon such other terms as may be deemed advisable by the President, and that any other assets, if any there be, owned by, or in the disposition of Minnesota Tea Company be sold or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

"Resolved, Further, that such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the consideration stipulated in said option and agreement modifying the same, or upon such other terms as the President may deem advisable, be made and effected, and that the President, or Vice-President, and the Secretary, in order to effect such sale of said assets of this company and to carry out the terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and hereby are authorized and directed to execute in behalf of Minnesota Tea Company any bill of sale, assignments, agreements, and other instruments required to effect such sale and transfer and also for such purpose to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

"Resolved, Further, that for the purpose of carrying out said plan adopted by the stockholders at said meeting of the stockholders, all money received by Minnesota Tea Company on the sale of its said assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in proportion to their respective stockholdings in Minnesota Tea Company upon the assumption by the stcokholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of such stock and securities for the payment of existing debts, and that a contract or agreement in writing shall be entered into by this company with its stockholders and signed by and in behalf of this company and its stockholders, whereby all the said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate

stock and securities received on said sale of its assets without being compelled to sell any part thereof for the payment of its existing debts, shall agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent, and further that the President be and hereby is authorized and directed to sign and execute such written agreement in behalf of Minnesota Tea Company with the stockholders of the company.

"Resolved, Further, that for the purpose of carrying out said plan adopted by the stockholders, Minnesota Tea Company continue to own and hold the said corporate stock and securities received by it on the sale of its assets without the sale or distribution thereof."

No further business came before the meeting, and on motion, duly seconded and carried, the Board then adjourned to meet on call of the President.

(Signed) A. F. PETERSON,
Secretary.

Attest:

(Signed) E. C. PETERSON,
President.

41 We, being all the Directors, hereby certify that the foregoing minutes are true and correct.

(Signed) E. C. PETERSON,
L. T. PETERSON,
A. F. PETERSON,
Directors.

EXHIBIT "D"

Agreement Supplemental to Option Dated July 2, 1928, for the Purchase of Minnesota Tea Company Property, Exercised July 6, 1928.

This Agreement, Made this 24th day of July 1928, by and between Minnesota Tea Company, a Minnesota corporation, hereinafter called the Seller, and O. B. Westphal, Esq., of Chicago, Illinois, hereinafter called the Buyer,

Witnesseth:

Whereas, by an instrument in writing dated July 2, 1928, the Seller heretofore granted an option to the Buyer for the purchase of certain assets of the Seller, for the consideration therein set forth, and the Buyer thereafter, on July 6, 1928, exercised said option; and

Whereas, it is desired to have the calculations required by paragraphs Fifth and Sixth of said exercised option made as of August 4, 1928, rather than as of the delivery date referred to in said exercised option, it being the desire of the parties to avoid any further expense of accounting between said August 4, 1928, and the delivery date herein agreed upon;

Now, Therefore, It Is Agreed by and between the parties hereto (any act done hereunder or any promise made herein by one of the parties to be taken as full and complete consideration for each and every promise made herein by the other party) as follows:

1. The delivery date referred to in said option is hereby extended to and including August 25, 1928.

2. It is agreed, however, that the calculations required by the Fifth and Sixth paragraphs of said option shall be made as of the end of August 4, 1928.

3. Between said August 4, 1928, and the said delivery date of August 25, 1928, as herein agreed, the Seller shall remain in
42 possession and management of its business, directing the same from its principal office at Duluth, Minnesota. All receipts during said period shall be deposited in a bank account to be opened in the name of "Minnesota Tea Company Special Account."

All expenses during said period shall be paid by checks drawn upon sad account. At the close of said period any balance remaining in said special account shall be turned over to the Buyer or his nominee, and any deficit which may exist at that time in said account shall be absorbed by the Buyer, it being the intention hereof to cause the operation of said Minnesota Tea Company to be for the account of the Buyer during said period from the end of August 4, 1928, to and including the delivery date of August 25, 1928, in the event the sale of assets contemplated by said exercised option is consummated, and to cause the operation of said Minnesota Tea Company to be for the account of the Seller during said period from the end of August 4, 1928, to the delivery date in the event the sale of assets contemplated by said exercised option is not consummated.

4. It is further agreed that the assets covered by said exercised option shall include, instead of exclude, all bills, notes, and accounts receivable which the parties to said [illegible] and hereto shall consider doubtful, but that in arriving at [illegible] price to be paid for the property covered by said option as thus modified, the books of the Minnesota Tea Company shall govern and the bills, notes, and accounts receivable which the parties hereto shall consider doubtful shall be deducted from the face value of corresponding items carried on such books at August 4, 1928, and in figuring the value of the assets as of December 31, 1927, the same percentage for doubtful items shall be deducted from the face value of corresponding items carried on such books at December 31, 1927, in order to determine whether the total purchase price shall be reduced or increased as provided in paragraphs Fifth and Sixth of said option.

5. It is further agreed that the Buyer does now, in good faith, make full inquiry of the Seller as to the names and places of residence and business of the Seller's creditors and the amount owing to each, and requests that a list thereof be furnished to him or his nominee on or before the 18th day of August 1928.

6. It is hereby agreed that the purchase contemplated by said
43 exercised option, as herein modified, will be exercised for and on behalf of the Buyer by his nominee, The Grand Union Company.

7. The five days' notice in writing of delivery date provided for in said option is hereby waived, August 25, 1928, having been herein agreed upon as such delivery date.

The said option of July 2, 1928, given by the Seller to the Buyer and so exercised is in full force and effect except as herein modified.

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President*, and
A. F. PETERSON, *Secretary*.
O. B. WESTPHAL [SEAL]

EXHIBIT "E"

A duly called meeting of the Stockholders of Minnesota Tea Company was held at its office and principal place of business at Duluth, Minnesota, on the 23rd day of August 1928, at 10 o'clock in the forenoon.

E. C. Peterson, L. T. Peterson, and A. F. Peterson, constituting all the Stockholders of said Company, were present at the meeting. E. C. Peterson, the President of the Company, presided at the meeting, and A. F. Peterson, the secretary of the Company, acted as Secretary thereof.

Upon motion duly made and seconded and unanimously carried, the following resolution was adopted:

Resolved, that the written option, dated July 2, 1928, given by this Company, signed by its President and Secretary, to O. B. Westphal, and the modification agreement made by this Company and signed in its name by its President and Secretary and by said O. B. Westphal, dated July 24th, 1928, be, and are, in all respects ratified, confirmed, and approved, and the actions of the officers of the Company in executing and delivering said option and modification are ratified, confirmed, and approved.

Resolved further, that the President or Vice President and Secretary of this company be, and they are hereby, authorized and directed to execute and deliver to The Grand Union Company, a Delaware corporation, bill of sale and instrument transferring the property covered by said option as modified and covering the agreements therein provided for, and they are hereby authorized and di-
44 rected to execute and deliver the bill of sale, conveyance, and agreement with The Grand Union Company now presented to this meeting, and that in closing said matter they are authorized to make any changes in form or substance of said instruments that they may deem advisable in carrying out the general plan and purpose of said option to said O. B. Westphal as so modified, which has been assumed by said The Grand Union Company, and they are

authorized and directed to execute and deliver any other instruments in general carrying out the purpose and intent of said option to said O. B. Westphal as so modified, and their action taken in this regard is approved and confirmed.

There being no further business to come before the meeting, the meeting adjourned.

(Signed) E. C. PETERSON,
President.

Attest:

(Signed) A. F. PETERSON,
Secretary.

Before United States Board of Tax Appeals

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

A. F. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 54227, 60837–60839. Promulgated June 30, 1933

1. The acquisition by one corporation of substantially all the properties of another corporation is not of itself a statutory reorganization under section 112 (i) (1), Revenue Act of 1928. Such acquisition, to come within section 112 (i) (1) (A), must be part of a strict merger or consolidation or of something which partakes
45 of or resembles a merger or consolidation and involves a continuance of essentially the same interests through modified corporate form.

2. In determining whether a statutory reorganization exists, the definition of section 112 (i) (1) must be read in its entirety and part A may not be applied so as to stultify part B.

3. Three persons owning all the shares of a corporation conducting a local business cause the corporation's assets to be transferred to

another existing corporation with nation-wide activities, for cash, which is immediately distributed, and 7½ per cent of the shares of the larger corporation. The local corporation continues its existence, holding as its assets the acquired shares, and the individuals continue as its shareholders. Held, not a statutory reorganization, the local corporation being taxable upon a gain measured by the difference between the cost of the assets transferred and the sum of the cash and value of shares received, and the individuals being taxable upon the cash dividend received.

C. J. McGuire, Esq., for the petitioners.

Prew Savoy, Esq., and George D. Brabson, Esq., for the respondent.

Opinion

STERNHAGEN: The respondent determined deficiencies in the income taxes of the petitioners as follows: Minnesota Tea Co., $11,587.64 for the period January 1, 1928, to August 24, 1928; E. C. Peterson, $15,982.31 for 1928; A. F. Peterson, $646.66 for 1928; and L. T. Peterson, $15,974.76 for 1928. There is no explanation for the use of a short tax period for the Minnesota Tea Co., although it is stated in the notice of deficiency of January 26, 1931, that "it is still a going concern." The facts are stipulated, and findings are unnecessary.

The Minnesota Tea Co., engaged in the retail grocery business, negotiated in 1928 for the transfer of its business to the Grand Union Co. Its shares were all owned by the three Petersons, and, so far as appears, still are. Before making the transfer to the Grand Union Co., it transferred its real estate and some miscellaneous property to the Peterson Investment Co., newly created for the purpose, in exchange for the Peterson Co.'s shares, which it immediately distributed proportionately among its three shareholders. Thus reduced, the entire assets of the Minnesota Co., 46 the statutory cost of which was $254,646.62, were transferred to the Grand Union Co. for $426,842.52 cash and 18,000 shares (voting trust certificates) of Grand Union no-par common, which it agreed not to sell for a year. The 18,000 shares were neither distributed nor sold. The $426,842.52 was distributed among the three shareholders, who assumed, and paid, the Minnesota Co.'s liabilities amounting to $106,471.73. At the time of the receipt by the Minnesota Co. of the cash and shares, its undistributed earnings and profits were $109,442.83. The outstanding shares of the Grand Union Co. were at this time 239,726, and they were being sold on the New York Stock Exchange for around 30.

Several questions are raised as to the gain resulting to each of the petitioners from these transactions and as to the recognition thereof as a statutory matter; but such questions are predicated upon the idea that there was a stautory reorganization, as that term is

defined by section 112 (i) (1),[1] Revenue Act of 1928. Whether there was such a reorganization must, therefore, be first decided. If there was no such reorganization, there is no foundation for the petitioners' attack on the deficiencies, and the respondent's determinations must be sustained; while if a statutory reorganization occurred, the measure of the resulting tax must be determined with regard to other statutory provisions.

At the time when the deficiencies were determined, there was a disposition to read the statutory definition with a superficial regard for its language, and thus to esay that the acquisition by one corporation of substantially all the properties of another corporation was per se a reorganization. The extent of this literalism is indicated by Sarther Grocery Co. vs. Commissioner, 63 Fed. (2d) 68, in which the view was urged by the taxpayer that a sale for cash of all
46 its properties by one corporation to another was a reorganization. See Tulsa Oxygen Co., 18 B. T. A. 1283; National Pipe & Foundry Co., 19 B. T. A. 242; First Nat. Bank of Champlain, 21 B. T. A. 415; Robert D. Green, 24 B. T. A. 719. In Cortland Specialty Co., 22 B. T. A. 808, the Board gave a broader consideration to the definition and, although there was "no question whatsoever but that substantially all of the [one] company's properties were acquired by the [other]", held that there was no reorganization.

In the development of the law by the courts, the literal view has never gained a foothold. The Fifth Circuit Court of Appeals, in Pinellas Ice & Cold Storage Co. vs. Commissioner, 57 Fed. (2d) 188, the first court decision on the subject, took quite the opposite view, saying:

"It must be assumed that in adopting paragraph (h) (of section 203, Revenue Act of 1926, to which the section now under consideration is similar) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point."

A few months later the Second Circuit Court of Appeals, in Cortland Specialty Co. vs. Commissioner, 60 Fed. (2d) 937, held that the acquisition by one corporation of all the properties of another was not to be treated by itself as a statutory reorganization; that such

[1] Sec. 112. Recognition of Gain or Loss.

* * * * * * * * *

(i) Definition of reorganization.—As used in this section and sections 113 and 115—
(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * * * * * *

acquisition, to be within the statute, must be related to what would in general legal parlance be referred to as a reorganization, but that the concept of such reorganization was not as restricted as the Fifth Circuit Court of Appeals had held, as being confined to technical mergers or consolidations, but could include other arrangements whereby there was substantially a continuance of the same interests in the business and properties affected, the change being only a modification in corporate form or structure.

The Supreme Court, in Pinellas Ice & Cold Storage Co. vs. Commissioner, 287 U. S. 462, held that the absolute view of the Fifth Circuit Court of Appeals was too narrow an interpretation of the statute. The Supreme Court cited with approval the opinion of the Second Circuit Court of Appeals in Cortland Specialty Co. vs. Com-
48 missioner, supra. It said that the parenthetical expression, "the acquisition of substantially all the properties of another corporation", has the effect of "expand[ing] the meaning of 'merger or consolidation' so as to include some things which partake of the nature of a merger or consolidation, but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation." It held that the situation before it "has no real semblance to a merger or consolidation."

In the light of these decisions it is now the law that the parenthetical expressions may not be considered separately, but only as parts of the entire section of the statute, and hence that the acquisition by one corporation of substantially all of another's properties is not, of itself, enough to constitute a statutory reorganization but must be part of a strict merger or consolidation or of something which partakes of the nature of a merger or consolidation and has a real semblance to a merger or consolidation and involves a continuance of essentially the same interests through a modified corporate structure.

This construction of part (A) of the definition must be shaped to fit into the definition as a whole. There is a plain intendment to correlate part (A) or part (B), for both deal with the change of ownership among corporations of their properties. Whether there be any substantial significance in the fact that (A) treats of the acquisition, thus apparently emphasizing the receiving side of the transaction, while (B) treats of the transfer, the opposite facet, is perhaps unimportant here; for, however that may be, they must both be construed to effect.[2] (A) may not be read so broadly in respect of the acquisition of property for stock as to stultify (B), dealing with the transfer of property for stock. Such a transfer, to be a reorganization under (B), must comply with the prescribed condition—"If immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets are trans-

[2] An examination of the history of these provisions seems to indicate that there was no deliberate design to differentiate between the phraseology of (A) and (B), but only to bring together, within the definition of reorganization, language which had already been used in separate parts of the statutory scheme.

ferred", and it would not do to treat as a reorganization a transfer for less than control through the device of calling it a merger and thus bringing it within (A). While, therefore, there is latitude in the term "merger", there is at the same time the necessity of keeping it within the bounds of (A) and not invading (B).

There is substantial difficulty in this. Some overlapping seems inevitable. It is therefore better not to attempt to formulate a rule of construction, which by its very language may serve to constrict the operation of the statute more narrowly than was intended. It is only important to fulfill the purpose indicated by the language of the statute. The underlying purpose of this section is to permit a change in the form of ownership which in essence does not affect continuance of the same actual ownership of substantially the same properties without fear of tax at the time of the formal change. In the case of a true merger or consolidation, the immunity from tax is extended beyond this purpose, since to the shareholder the result is to give him new shares representing properties in some of which he therefore had no interest. While through modified forms he has a continuing interest in the same assets, although in a lessened proportion, he also acquires an interest in entirely new assets.

Is this, then, an arrangement which for the purpose of the statute so far partakes of the nature of a merger or consolidation or resembles it as to bring about the same tax result, notwithstanding it is not the transfer of properties for controlling shares of the transferee? Three persons owning all the shares of a corporation conducting a local business cause the corporation's assets to be transferred to another existing corporation with Nation-wide activities, for cash, $426,842.52, which is distributed to them, and approximately 7½ percent of the shares of the large corporation, worth approximately $540,000. The local corporation continues its existence, holding as its assets the acquired shares, and the individuals continue to be the owners of their original shares. We think it is not within the scope of the statute.

The nature of the transaction is the same as that treated in (B), except for the condition. Omitting consideration of the cash received, since its effect is found rather in subdivision (d) than in the definition of subdivision (i), there was a transfer by one corporation of all its properties to another for stock in the transferee, but instead of being in control, which by subdivision (j) means the ownership of at least 80 percent of the transferee's shares, there is ownership by the transferor of only 7½ percent of such shares. Thus the transaction appears to be far from a continuing interest in the same property through a mere change in forms of ownership but rather an almost complete change in the essential assets owned; and this still disregards the large proportion of cash received.

This wide departure from the percentage of stock upon which (B) is conditioned, in a transaction which is otherwise within that part of the definition, should make us slow to find (A) nevertheless applicable.

The parties to the transaction deliberately for their own purposes refrained from a merger. Furthermore, they chose an arrangement which avoided the result of a merger. Instead of the shareholders of the Minnesota Co. owning shares of the Grand Union Co., as they would have if there had been a merger, they continued to own Minnesota shares; and instead of the Minnesota Co.'s disappearance as in a merger, its existence and powers continued, and as the owner of the Grand Union shares it brought about a freedom from immediate tax upon the dividends upon such Grand Union shares, since by section 23 (p) such dividends are deductible by a corporation simultaneously with their receipt as gross income, while to an individual shareholder dividends are subject to surtax.

This decision does not restrict (A) to technical mergers. It still leaves room for a more expansive application of the statute. It might be suggested, for example, that by having the assets of the Minnesota Co. transferred to the Grand Union in exchange for shares and then having the Minnesota Co. promptly distribute such shares among its own shareholders in liquidation and dissolve, so that in all substantial respects the outcome would have been the same as if a true merger had occurred, the petitioners might properly have invoked part (A) of the definition. How much further from a true merger they might have gone and yet achieved what the statute calls a reorganization we do not attempt to say. It is enough now to hold that the facts before us go further than the statute implies, and that there was no reorganization.

In this view, the Minnesota Co. realized a gain measured by the difference between the $254,646.62, cost of its property, and $966,842.52, being the sum of $426,842.52 cash and $540,000, the value of the 18,000 shares of Grand Union Co. Section 111. This gain of $712,195.90 may not escape recognition. Section 112 (a).

The question is suggested whether the 18,000 shares of Grand
51 Union stock were without fair market value, since there was a covenant against its sale within a year after its receipt. The petitioners say they do not press the point before the Board, but "preserve it for the purpose of the record." The restriction was a contractual obligation and therefore voluntary, and does not, in our opinion, leave the shares without fair market value, as that term is meant to be used in the statute. See Newman vs. Commissioner, 40 Fed. (2d) 225. This fair market value we find to be $30 a share.

As to the Petersons, it follows from the foregoing that the distribution to them, as shareholders, of the cash surplus was, after being reduced by the amount of the liabilities assumed, $106,471.73, an ordinary dividend subject to surtax.

Reviewed by the Board.

Judgment will be entered under Rule 50.

MARQUETTE concurs in the result.

Dissenting opinion

VAN FOSSAN, dissenting: It seems clear to me that the prevailing opinion goes much further than is warranted either by the language of the revenue acts or by the authoritative decisions of the courts. It reads into the statute a concept and a limitation neither written in nor intended by Congress.

Dissenting opinion

BLACK, dissenting: The effect of the majority opinion as I construe it is to interpret paragraph (1) (A) of section 112 (i) of the Revenue Act of 1928, which now reads: "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)" as if the last clause quoted above were made to read: "or substantially all the properties of another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the properties are transferred." I find no warrant for reading into the statute this language which is not there.

In support of the conclusion which it reaches, the majority opinion cites Cortland Specialty Co., 22 B. T. A. 808; affd., 60 Fed. (2d) 937, and Pinellas Ice & Cold Storage Co. vs. Commissioner, 287 U. S. 462. I do not think these two cases are authority for what the Board holds in the instant case.

52 In the Cortland Specialty Co. case, one corporation transferred its assets to another in consideration of cash and promissory notes. The Board held that the transaction was not a reorganization, but simply a sale by one corporation of its assets to another. This view was upheld by the Circuit Court of Appeals for the Second Circuit, the court holding that the transaction did not come within section 203 (e), Revenue Act of 1926, because the property received for the assets sold did not include "stock or securities", the notes received not being so classifiable. There was no continuity of interest on the part of the transferor corporation or its stockholders in the property sold because neither the selling corporation nor its stockholders received stock in the purchasing corporation. The situation in Pinellas Ice & Cold Storage Co. was pretty much the same. There two corporations owned by the same stockholders sold their assets to a third corporation for cash and promissory notes. No stock or other securities of the purchasing corporation were received. The Supreme Court held that the transaction was a mere sale of assets and did not partake of any of the features of either a merger or a consolidation. The court was, however, careful to point out that the words within the parenthesis of (A) might not be disregarded. On that point the court said:

"* * * the words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short term purchase money notes."

In the instant case the seller acquired an interest in the affairs of the purchasing company to the extent of 18,000 shares (voting trust certificates) of its no-par common stock. This, in my opinion, gave the transferring corporation that continuing interest in the new enterprise which brings the transaction within the definition of (A) above quoted. As to the cash received in the transaction,
53 it is taxable to the corporation to the extent of the gain realized, unless distributed to the stockholders in pursuance of the plan of reorganization. This is so by reason of section 112 (d) of the Revenue Act of 1928, which reads:

"If an exchange would be within the provisions of subsection (b) (4) of this section; if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

It is my understanding that it is under the foregoing provision that the Commissioner has determined that there is a taxable gain to the corporation in this proceeding to the extent of $106,471.73. On the date that petitioner, the Minnesota Tea Co., transferred all of its assets to the Grand Union Co. for 18,000 shares of its common stock plus $426,842.52 in cash, pursuant to resolutions authorizing the transfer, it immediately distributed the cash pro rata to its shareholders, the petitioners, E. C., A. F., and L. T. Peterson, who assumed and thereafter duly discharged all of its liabilities. The petitioners Peterson received cash in the amount of $426,842.52 and assumed and paid liabilities of $106,471.73, each thereby receiving his pro rata portion of the net distribution of $320,370.79. Respondent has held this taxable to each of the petitioners Peterson as

dividends received from the corporation, and has held the $106,471.73 taxable to the corporation as profit from the transfer of assets, received in cash and not distributed to the stockholders in pursuance to a plan of reorganization. The Commissioner contends that this $106,471.73 was impressed with a trust, that the stockholders should use it to pay the debts of the corporation and that this is not a distribution to stockholders within the meaning of the statute above quoted, but is equivalent to the corporation itself using
54 the money to pay its debts. With this view I agree. The majority opinion, however, does not affirm the deficiency against the corporation on that ground, but on the ground that there was no reorganization and the whole transaction was taxable. With this view, for reasons I have already stated, I disagree. I do not discuss the question as to whether the $320,370.79 admittedly distributed to the petitioners Peterson is all taxable to them as dividends as determined by respondent, or only a part as contended by petitioners. The majority opinion having affirmed the deficiencies on the ground that there was no reorganization, I am content to record my dissent to that holding.

Before United States Board of Tax Appeals, Washington

Docket No. 60837

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination, December 18, 1933

Subsequent to the Board's report, promulgated June 30, 1933, 28 B. T. A. 591, the respondent filed a proposed judgment which the petitioner agrees is in conformity with the said report. In accordance therewith, it is

Ordered, adjudged, and decided that there is a deficiency of $15,982.31 in income tax for 1928.

[SEAL] (Signed) JOHN M. STERNHAGEN,
Member.

U. S. Board of Tax Appeals, 1924.
Enter
Entered Dec. 18, 1933.

Before United States Board of Tax Appeals, Washington

Docket No. 60839

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination, December 18, 1933

Subsequent to the Board's report, promulgated June 30, 1933,
55 28 B. T. A. 591, the respondent filed a proposed judgment which the petitioner agrees is in conformity with the said report. In accordance therewith, it is

Ordered, adjudged and decided that there is a deficiency of $15,974.76 in income tax for 1928.

[SEAL] (Signed) JOHN M. STERNHAGEN,
Member.

Enter

Entered Dec. 18, 1933.

In United States Circuit Court of Appeals For the Eighth Circuit

[Title omitted.]

Petition of E. C. Peterson for review of decision of United States Board of Tax Appeals in case no. 60837

Filed February 5, 1934

To the Honorable Circuit Court of Appeals for the Eighth Circuit:

The petition of E. C. Peterson, a resident and inhabitant of the City of Duluth, St. Louis County, Minnesota, respectfully shows:

One. This is a proceeding for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the United States Board of Tax Appeals entered December 18, 1933, redetermining a deficiency in income taxes for the calendar year 1928 in amount $15,982.31, petitioner having filed his income tax return for said year with the Collector of Internal Revenue, St. Paul, Minnesota.

Two. The nature of the controversy before said Board of Tax Appeals was the redetermination of the deficiency in income taxes for the calendar year 1928 and, in particular, whether the petitioner was subject to a tax as a result of the transactions hereinafter set forth. The controversy comes up for review as follows:

(1) Minnesota Tea Company is a Minnesota corporation, the entire stock in which, in 1928 and for several years prior thereto, was owned by petitioner and two others, in the following amounts:

56

E. C. Peterson	702 shares
A. F. Peterson	113 shares
L. T. Peterson	702 shares

(2) On August 23, 1928, the Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, receiving therefor 18,000 shares of the common capital stock of Grand Union Company and $426,842.52 in cash. The exchange was accomplished through the exercise of an option granted to O. B. Westfall as agent for Grand Union Company, which option was exercised on July 6, 1928. Thereafter, Minnesota Tea Company, by appropriate resolution of the stockholders, authorized and directed the immediate distribution to the stockholders, in the proportion of their respective stock holdings, of the cash so received from Grand Union Company. This resolution further provided for the execution on the part of the company and its stockholders of a written agreement whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold said corporate stock (in Grand Union Company) without being compelled to sell any part thereof for the payment of existing debts, agreed to pay all the corporate debts of Minnesota Tea Company, whether due and payable or not and whether certain or contingent.

(3) The entire sum of $426,842.52 was immediately distributed and the amounts received and the liabilities assumed by the stockholders under this resolution were respectively as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,830.66	7,930.99	23,899.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	$426,842.52	$106,471.73	$320,370.79

(4) The respective bases of the Minnesota Tea Company stock owned by the petitioner and the other stockholders for the purpose of determining gain or loss from the sale or disposition thereof was:

E. C. Peterson	$59,376.78
A. F. Peterson	$ 9,573.17
L. T. Peterson	$59,376.78

On the date of the transfer the undistributed profits and earnings of Minnesota Tea Company amounted to $109,442.-
57 73. The respondent, in his final determination of the 1928 tax liability of this petitioner, held that the entire distribution to petitioner of $148,235.56 and the total net amount received by all the stockholders ($320,370.79) was out of earnings and profits of Minnesota Tea Company and added to the earnings and profits ex-

isting at the time of the transfer, namely, $109,442.83, the amount of profit which would have been realized if gain on the exchange was recognized.

(5) The 18,000 shares of Grand Union Company stock were received subject to an agreement on the part of the Minnesota Tea Company not to dispose of any of said stock for a period of one year from the delivery date, other than to stockholders of Minnesota Tea Company, and that if it should dispose of any of the same to said stockholders, it would cause them, at the time of acquisition, to enter into an agreement with the Grand Union Company agreeing that for such period they would not sell or otherwise dispose of any of the same to be acquired by them. Minnesota Tea Company did not dispose of the 18,000 shares but, on the contrary, held them.

(6) The matter came on for hearing before the Board of Tax Appeals at Washington, D. C., upon the petition of the petitioner requesting a redetermination of the determination of the Commissioner of Internal Revenue. The answer of the Commissioner, as respondent, was duly filed, and the case was at issue on the question of whether respondent's action in increasing earnings and profits as hereinbefore indicated, was proper.

(7) The facts in the case were presented by stipulation. The case was presented to the Board of Tax Appeals, upon the assumption by both the petitioner and the respondent that the state of facts stipulated indicated a statutory reorganization under Sec. 112 (i) (1) of the Revenue Act of 1928. Prior to the issuance of its decision, the Board indicated that it was in doubt as to whether the assumption of both parties, that there had been a reorganization, was correct; and the petitioner's counsel was advised thereof and thereafter filed a memorandum upon that question. Thereafter and on the 30th day of June 1933, the Board of Tax Appeals promulgated its opinion (two members dissenting), wherein it was determined that there was no reorganization, and holding that the petitioner was taxable in the amount of $15,982.31.

(8) Thereafter and on the 18th day of December 1933 judgment was entered against petitioner in said amount.

58 (9) The petitioner, being aggrieved by said findings of the Board, opinion, decision, and orders, files this petition for a review thereof.

Assignments of Error

Three. The errors committed by said Board of Tax Appeals upon which the petitioner relies as a basis of this proceeding are as follows:

(1) The Board erred in holding that the petitioner was taxable upon any sum in excess of $50,645.27.

(2) The Board erred in holding that any amount in excess of $109,442.73 of the money distributed to the stockholders of Minnesota Tea Company was a distribution from earnings and profits.

(3) The Board erred in holding that the transactions above set forth and appearing in the stipulated facts did not constitute a reorganization as defined in Sec. 112 (i) (1) of the Revenue Act of 1928.

(4) The Board erred in holding that petitioner had failed to establish that there was no taxable income to petitioner in excess of $50,645.27, as a result of the transactions set forth in the stipulated statement of facts.

(5) The Board erred in rendering the decision for the respondent.

Wherefore your petitioner prays that this Honorable Court may review the action of the Board of Tax Appeals in this cause, reverse the decision of the Board, and direct the entry of the decision by said Board in favor of the petitioner, determining that there is no deficiency in income tax for the year 1928 due from the petitioner; and for such other and further relief as may to this Court appear proper in the premises.

E. C. PETERSON,
Petitioner.

OSCAR MITCHELL,
1200 Alworth Building, Duluth, Minnesota,
Counsel for Petitioner.

[*Duly sworn to by E. C. Peterson; jurat omitted in printing.*]

59 In United States Circuit Court of Appeals for the Eighth Circuit

(Title omitted.)

Petition of L. T. Peterson for review of decision of United States Board of Tax Appeals in case no. 60839

Filed February 5, 1934

To the Honorable Circuit Court of Appeals for the Eighth Circuit:

The petition of L. T. Peterson, a resident and inhabitant of the City of Duluth, St. Louis County, Minnesota, respectfully shows:

One. This is a proceeding for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the United States Board of Tax Appeals entered December 18, 1933, redetermining a deficiency in income taxes for the calendar year 1928 in amount $15,974.76, petitioner having filed his income-tax return for said year with the Collector of Internal Revenue, St. Paul, Minnesota.

Two. The nature of the controversy before said Board of Tax Appeals was the redetermination of the deficiency in income taxes for the calendar year 1928 and, in particular, whether the petitioner was subject to tax, as a result of the transactions hereinafter set forth. The controversy comes up for review as follows:

(1) Minnesota Tea Company is a Minnesota corporation, the entire stock in which, in 1928 and for several years prior
60 thereto, was owned by petitioner and two others, in the following amounts:

E. C. Peterson	702 shares
A. F. Peterson	138 shares
L. T. Peterson	702 shares

(2) On August 23, 1928, the Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, receiving therefor 18,000 shares of the common capital stock of Grand Union Company and $426,842.52 in cash. The exchange was accomplished through the exercise of an option granted to one O. B. Westfall as agent for Grand Union Company, which option was exercised on July 6, 1928. Thereafter, Minnesota Tea Company, by appropriate resolution of the stockholders, authorized and directed the immediate distribution to the stockholders, in the proportion of their respective stockholdings, of the cash so received from Grand Union Company. This resolution further provided for the execution on the part of the company and its stockholders of a written agreement whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold said corporate stock (in Grand Union Company) without being compelled to sell any part thereof for the payment of existing debts, agreed to pay all the corporate debts of Minnesota Tea Company, whether due and payable or not and whether certain or contingent.

(3) The entire sum of $426,842.52 was immediately distributed and the amounts received and the liabilities assumed by the stockholders under ths iresolution were respectively as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,930.66	7,930.99	23,999.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	426,842.52	106,471.73	320,370.79

(4) The respective bases of the Minnesota Tea Company stock owned by the petitioner and the other stockholders for the purpose of determining gain or loss from the sale or disposition thereof was:

E. C. Peterson	$59,376.78
A. F. Peterson	9,573.17
L. T. Peterson	59,376.78

61 On the date of the transfer the undistributed profits and earnings of Minnesota Tea Company amounted to $109,442.72. The respondent, in his final determination of the 1928 tax liability of this petitioner, held that the entire distribution to petitioner of $148,235.56 and the total net amount received by all the stockholders ($320,370.79) was out of earnings and profits of Minnesota Tea Company and added to the earnings and profits existing at the time of

the transfer, namely, $109,442.83, the amount of profit which would have been realized if gain on the exchange was recognized.

(5) The 18,000 shares of Grand Union Company stock were received subject to an agreement on the part of the Minnesota Tea Company not to dispose of any of said stock for a period of one year from the delivery date, other than to stockholders of Minnesota Tea Company, and that if it should dispose of any of the same to said stockholders it would cause them, at the time of acquisition, to enter into an agreement with the Grand Union Company agreeing that for such period they would not sell or otherwise dispose of any of the same to be acquired by them. Minnesota Tea Company did not dispose of the 18,000 shares, but, on the contrary, held them.

(6) The matter came on for hearing before the Board of Tax Appeals at Washington, D. C., upon the petition of the petitioner requesting a redetermination of the determination of the Commissioner of Internal Revenue. The answer of the Commissioner, as respondent, was duly filed and the case was at issue on the question of whether respondent's action in increasing earnings and profits, as hereinbefore indicated, was proper.

(7) The facts in the case were presented by stipulation. The case was presented to the Board of Tax Appeals, upon the assumption by both the petitioner and the respondent that the state of facts stipulated indicated a statutory reorganization under Sec. 112 (i) (1) of the Revenue Act of 1928. Prior to the issuance of its decision the Board indicated that it was in doubt as to whether the assumption of both parties, that there had been a reorganization, was correct; and the petitioner's counsel was advised thereof and thereafter filed a memorandum upon that question. Thereafter and on the 30th day of June 1933 the Board of Tax Appeals promulgated its opinion
(two members dissenting), wherein it was determined that
62 there was no reorganization, and holding that the petitioner was taxable in the amount of $15,974.76.

(8) Thereafter and on the 18th day of December 1933 judgment was entered against petitioner in said amount.

(9) The petitioner, being aggrieved by said findings of the Board, opinion, decision, and orders, files this petition for a review thereof.

Assignments of Error

Three. The errors committed by said Board of Tax Appeals upon which the petitioner relies as a basis of this proceeding, are as follows:

(1) The Board erred in holding that the petition was taxable upon any sum in excess of $50,645.27.

(2) The Board erred in holding that any amount in excess of $109,442.73 of the money distributed to the stockholders of Minnesota Tea Company was a distribution from earnings and profits.

(3) The Board erred in holding that the transactions above set forth and appearing in the stipulated facts did not constitute a re-

organization as defined in Sec. 112 (i) (1) of the Revenue Act of 1928.

(4) The Board erred in holding that petitioner had failed to establish that there was no taxable income to petitioner in excess of $50,645.27, as a result of the transactions set forth in the stipulated statement of facts.

(5) The Board erred in rendering the decision for the respondent.

Wherefore, your petitioner prays that this Honorable Court may review the action of the Board of Tax Appeals in this cause, reverse the decision of the Board, and direct the entry of the decision by said Board in favor of the petitioner, determining that there is no deficiency in income tax for the year 1928 due from the petitioner; and for such other and further relief as may to this Court appear proper in the premises.

L. T. PETERSON.

OSCAR MITCHELL,
1200 Alworth Building, Duluth, Minnesota,
Counsel for Petitioner.

63 [Duly sworn to by L. T. Peterson; jurat omitted in printing.]

Before United States Board of Tax Appeals

Docket Nos. 60837, 60838, and 60839

Stipulation for consolidation of appeals and as to dismissal of appeal of A. F. Peterson, case no. 60838

Filed May 17, 1934

[Title omitted.]

A petition for review having been filed in the above-entitled and numbered proceedings and a joint praecipe having been filed, it is hereby stipulated and agreed by counsel for the respective parties that the records in the cases of E. C. Peterson and L. T. Peterson may be consolidated and that it is not necessary that any record be prepared in the case of A. F. Peterson in view of the fact that such proceeding has been dismissed by the Circuit Court of Appeals for the Eighth Circuit on stipulation therein filed.

OSCAR MITCHELL,
Counsel for Petitioners,
1200 Alworth Building, Duluth, Minnesota.
(Sgd.) ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

64 Before United States Board of Tax Appeals

Docket Nos. 60837, 60838, and 60839

Praecipe for transcript

Filed March 10, 1934

[Title omitted.]

To: E. Barrett Prettyman, Esquire, General Counsel, Bureau of Internal Revenue, Washington, D. C.

Please take notice that the petitioners in the above-entitled proceeding designate the following portions of the Record in this cause to be incorporated into the transcript on their appeal:

1. Docket entries of the proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals.
3. Agreed statement of facts.
4. Opinion and decision of the Board of Tax Appeals.
5. Petition for review.
6. Agreed statement of facts.
7. Judgment.
8. This praecipe.

The foregoing transcript to be prepared conformably to law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

Please take further notice that on the day of 1934, at 9:30 o'clock a. m., I shall move that the above portions of the Record, as designated, be incorporated in the transcript on appeal heretofore taken to the United States Circuit Court of Appeals for the Eighth Circuit.

Respectfully.

(Sgd.) OSCAR MITCHELL,
Attorney for Petitioners,
1200 Alworth Building, Duluth, Minnesota.

Dated March 10, 1934.

Service acknowledged.

(Sgd.) ROBERT H. JACKSON,
Als.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66-68 [Appearances of counsel omitted in printing.]

69 In United States Circuit Court of Appeals, Eighth Circuit

Order of submission

Memorandum of clerk:

On the 27th day of November 1934 and the 28th day of November 1934, respectively, these causes, nos. 10032 and 10033, together with cause no. 10031, were submitted to the United States Circuit Court of Appeals for the Eighth Circuit, and a full copy of the order of argument and of the order of submission having been included in the transcript taken for the Supreme Court of the United States on an application for writ of certiorari in cause no. 10031, Minnesota Tea Company, petitioner, vs. Commissioner of Internal Revenue, respondent, the same are omitted from the transcript in these causes, nos. 10032 and 10033.

70 In United States Circuit Court of Appeals, Eighth Circuit

No. 10032. March term, A. D. 1935

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review of decision of United States Board of Tax Appeals

No. 10033. March term, A. D. 1935

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review of decision of United States Board of Tax Appeals

Mr. Homer Hendricks and Mr. James G. Nye (Mr. Oscar Mitchell and Messrs. Mitchell, Gillette, Nye, and Harries were with him on the brief), for petitioners; Mr. J. Louis Monarch, Special Assistant to the Attorney General (Mr. Frank J. Wideman, Assistant Attorney General, and Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, were with him on the brief), for respondent.

71 Before SANBORN, WOODROUGH, and BOOTH, Circuit Judges

Opinion March 25, 1935

BOOTH, Circuit Judge, delivered the opinion of the court:

There are here two petitions for review of decisions of the United States Board of Tax Appeals.

The Board held that there was a deficiency in the income taxes for the calendar year 1928 of E. C. Peterson in the amount of $15,982.31; and of L. T. Peterson in the amount of $15,974.76.

There were also involved the income taxes of A. F. Peterson, but by stipulation that matter has been disposed of.

The petitions were submitted on an agreed statement of facts, and are companion cases—or at least very closely allied—to the petition no. 10031, Minnesota Tea Company v. Commissioner.

The following facts appear: the three Petersons owned the entire stock of the Minnesota Tea Company for several years prior to 1928. On August 23, 1928, the Minnesota Tea Company transferred all of its assets to the Grand Union Company, receiving 18,000 shares of common stock of the Grand Union Company and $426,842.52 in cash.

Upon the completion of the transaction the cash received from the Grand Union Company was immediately distributed by the Minnesota Tea Company to its stockholders, pursuant to a resolution of the stockholders passed at a special meeting, the stockholders assuming the debts of the corporation, amounting to $106,471.73.

The amounts received and the liabilities assumed by each of the stockholders of the Minnesota Tea Company were as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,830.66	7,930.99	23,899.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	$426,842.52	$106,471.73	$320,370.79

The amount of undistributed earnings and profits of the Minnesota Tea Company immediately prior to the exchange was $109,442.83.

72 The Commissioner held that the entire net receipts of $320,370.79 were out of earnings and profits; and the deficiencies were computed on the basis of taxing the entire amount of $320,370.79 as a dividend.

Two contentions are involved in these petitions: the first is that the transaction whereby the Minnesota Tea Company exchanged its assets for stock of the Grand Union Company and cash was a reorganization.

This is the same question that was involved in no. 10,031, Minnesota Tea Company v. Commissioner, and has been decided in favor of the contention of petitioners (opinion filed as of the same date with this opinion).

The second contention involves the question: If the Minnesota Tea transaction is held to be a reorganization, petitioners conceding that a part of the distribution is taxable as a dividend, whether any part of the balance is taxable as a capital gain.

It appears from the record that the controversy was submitted to the Board of Tax Appeals on the assumption that there was a reorganization of the Minnesota Tea Company; but it further appears that the Board of Tax Appeals held that there was in fact no reorganization; and it further appears that the redetermination by the Board of Tax Appeals of the tax deficiencies of petitioners was on the basis of no reorganization of the Minnesota Tea Company, and that no redetermination of deficiency has been made by that Board on the basis that there was a reorganization; in other words, the question whether all of this net cash should be taxed as dividends if the Minnesota Tea transaction should be held to be a reorganization was neither considered nor decided by the Board.

Under the circumstances, and in view of the holding of this court in case no. 10,031 that there was a reorganization, it is deemed advisable by this court that these petitions for review be granted, that the orders of the Board of Tax Appeals redetermining deficiencies as to petitioners be reversed, and the causes remanded to the Board of Tax Appeals with instructions for further proceedings not inconsistent with the foregoing opinion.

73

It is so ordered.

WOODROUGH, Circuit Judge, dissents on the grounds indicated by dissenting opinion in no. 10,031, Minnesota Tea Company v. Commissioner of Internal Revenue.

74 In United States Circuit Court of Appeals, Eighth Circuit

No. 10,032

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

Decree, March 25, 1935

On petition to review decision of United States Board of Tax Appeals

This cause came on to be heard on the petition for review of a decision of the United States Board of Tax Appeals which redetermined a deficiency in the income tax of the petitioner for the calendar year 1928, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the said petition for review in this cause be, and it is hereby, granted, and that the order of the said Board of Tax Appeals be, and it is hereby, reversed, without the taxation of costs in favor of either of the parties in this court.

And it is further ordered by this court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals with instructions for further proceedings not inconsistent with the opinion of this court.

March 25, 1935.

75 In United States Circuit Court of Appeals, Eighth Circuit

No. 10,033

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

Decree, March 25, 1935

On petition to review decision of United States Board of Tax Appeals

This cause came on to be heard on the petition for review of a decision of the United States Board of Tax Appeals which redetermined a deficiency in the income tax of the petitioner for the calendar year 1928, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the said petition for review in this cause be, and it is hereby, granted, and that the order of the said Board of Tax Appeals be, and it is hereby, reversed, without the taxation of costs in favor of either of the parties in this court.

And it is further ordered by this court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals with instructions for further proceedings not inconsistent with the opinion of this court.

March 25, 1935.

76 [Clerk's certificate to foregoing transcript omitted in printing.]

77 Supreme Court of the United States

No. 175, October term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following no. 174.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

78 Supreme Court of the United States

No. 176, October term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following nos. 174 and 175.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File nos. 39729, 39730. U. S. Circuit Court of Appeals, Eighth Circuit. Term no. 175. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. E. C. Peterson. Term no. 176. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. L. T. Peterson. Petition for writs of certiorari and exhibit thereto. Filed June 25, 1935. Term nos. 175 O. T. 1935, 176 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILE COPY

Nos. 175 176

In the Supreme Court of the United States

October Term, 1935

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

v.

E. G. Liebmann

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

v.

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

E. C. PETERSON

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

L. T. PETERSON

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cases on March 25, 1935.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 44) is reported in 28 B. T. A. 591. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 76 F. (2d) 806.

JURISDICTION

The judgments of the Circuit Court of Appeals were rendered on March 25, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the definition of the term "reorganization" contained in clause (a) of Section 112 (i) (1) of the Revenue Act of 1928 should be limited to transactions which partake of the nature of mergers or consolidations.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix to the Government's petition for certiorari in *Helvering* v. *Minnesota Tea Co.*, filed simultaneously herewith.

STATEMENT

The facts, as stipulated before the Board of Tax Appeals, are substantially as follows (R. 23–44):

The respondents herein are individuals residing at Duluth, Minnesota. During the taxable year

1928 the entire issued capital stock, 1,517 shares, of the Minnesota Tea Company, a corporation, was held as follows (R. 24):

	Shares
E. C. Peterson	702
A. F. Peterson	113
L. T. Peterson	702

These shares were acquired by the respective stockholders more than two years prior to August 23, 1928. (R. 24.)

On August 23, 1928, the said Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of the common capital stock (represented by voting trust certificates) of said Grand Union Company, plus the sum of $426,842.52 in cash. No liabilities of Minnesota Tea Company were assumed by Grand Union Company. (R. 24.)

The transfer was effected in accordance with the option and resolutions marked Exhibits A to E, which appear in the record at pages 27 to 43, inclusive.

The basis to the Minnesota Tea Company of the assets so transferred to Grand Union Company, for computing gain or loss, was $254,646.62. Minnesota Tea Company, immediately upon the receipt of the said cash in the amount of $426,842.52, paid this cash to its said stockholders, in proportion to their stockholdings and at the time of said payment the said stockholders assumed, in proportion to their stockholdings, the liabilities of the said Min-

nesota Tea Company amounting to $106,471.73, and thereafter the stockholders duly discharged and paid said liabilities so assumed. (R. 25.)

The amounts of said payments to the respective stockholders, and the amounts of the liabilities respectively assumed, were as follows (R. 26):

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,830.66	7,930.99	23,899.67
L. T. Peterson	197,505.93	49,270.37	148,235.56

The amount of the tax due from the respondents, two of the above-named stockholders of the Minnesota Tea Company, depends solely upon whether the transfer of the properties of the Minnesota Tea Company to the Grand Union Company was a reorganization within the meaning of the Revenue Act.

Before the Board these cases were consolidated with that of *Minnesota Tea Co.* v. *Commissioner*, and all of the cases were decided in one opinion. (R. 44.) The Board of Tax Appeals held that the transaction was not a reorganization. In separate opinions the Circuit Court of Appeals reversed both the *Minnesota Tea Co.* case (76 F. (2d) 797) and the *Peterson* cases (76 F. (2d) 806).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals and remanding these cases for further consideration of

the tax liability upon the basis that the transaction between the Minnesota Tea Company and the Grand Union Company was a reorganization within the meaning of the statute.

REASONS FOR GRANTING THE WRITS

These cases depend upon a question presented in the petition for certiorari in *Helvering* v. *Minnesota Tea Co.*, No. —, October Term, 1935, filed simultaneously herewith. This petition is filed in order that the Government's rights may be preserved pending the determination of the petition in that case. There is no separate question here involved, and if the petition in the *Minnesota Tea Co.* case should be granted it may suit the convenience of the Court to defer action upon this petition until final decision in that case.

Respectfully submitted.

STANLEY REED,
Solicitor General.

JUNE, 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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Nos. 175 and 176

In the Supreme Court of the United States

OCTOBER TERM, 1935

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

E. C. PETERSON

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

L. T. PETERSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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Case:

Guy T. Helvering, Commissioner of Internal Revenue, v. Minnesota Tea Company, No. 174, Oct. Term, 1935 ..... 2, 5

28886—35

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 175

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

E. C. PETERSON

No. 176

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

L. T. PETERSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 35–43) is reported in 28 B. T. A. 591. The majority and dissenting opinions in the United States Circuit Court of Appeals for the Eighth Circuit are reported in 76 F. (2d) 806.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 25, 1935 (R. 54, 55). The petition for writs of certiorari was filed June 25, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the transfer of assets between the Minnesota Tea Company and the Grand Union Company constituted a reorganization within the meaning of clause (A) of Section 112 (i) (1) of the Revenue Act of 1928.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A to the brief for the petitioner in *Guy T. Helvering, Commissioner of Internal Revenue* v. *Minnesota Tea Company,* No. 174, present term, filed herewith.

STATEMENT

The facts, as stipulated before the Board of Tax Appeals (R. 18–21), are substantially as follows:

The respondents herein are individuals residing at Duluth, Minnesota (R. 18).

During the taxable year 1928 the entire issued capital stock, 1,517 shares, of the Minnesota Tea Company, a corporation, was held as follows (R. 18):

	Shares
E. C. Peterson	702
A. F. Peterson	113
L. T. Peterson	702

These shares were acquired by the respective stockholders more than two years prior to August 23, 1928 (R. 18).

On August 23, 1928, the said Minnesota Tea Company transferred its assets (except those transferred to Peterson Investment Company (R. 21)) to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of the common capital stock (represented by voting-trust certificates) of said Grand Union Company, plus the sum of $426,842.52 in cash. No liabilities of Minnesota Tea Company were assumed by the Grand Union Company. (R. 18.)

The transfer was effected in accordance with the option and resolutions marked Exhibits "A" to "E", which appear in the record at pages 21 to 35, inclusive.

The basis to the Minnesota Tea Company of the assets so transferred to Grand Union Company, for computing gain or loss, was $254,646.62. The Minnesota Tea Company, immediately upon the receipt of the said cash in the amount of $426,842.52, paid this cash to its said stockholders, in proportion to their stockholdings, and at the time of said payment the said stockholders assumed, in proportion to their stockholdings, the liabilities of the said Minnesota Tea Company amounting to $106,471.73, and thereafter the stockholders duly discharged and paid said liabilities so assumed. (R. 19.)

The amounts of said payments to the respective stockholders, and the amounts of the liabilities respectively assumed, were as follows (R. 20):

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,806.93	$49,270.37	$148,536.56
A. F. Peterson	31,830.00	7,930.00	23,900.00
L. T. Peterson	197,806.93	49,270.37	148,536.56
	426,843.86	106,471.73	320,372.13

The amount of the tax due from the respondents, two of the above-named stockholders of the Minnesota Tea Company, depends solely upon whether the transfer of the properties of the Minnesota Tea Company to the Grand Union Company was a reorganization within the meaning of the Revenue Act.

Before the Board these cases were consolidated with that of *Minnesota Tea Company* v. *Commissioner*, 28 B. T. A. 591, and all of the cases were decided in one opinion (R. 35). The Board of Tax Appeals held that the transaction was not a reorganization. In separate opinions the Circuit Court of Appeals reversed both the *Minnesota Tea Company* case (76 F. (2d) 797) and the *Peterson* cases (76 F. (2d) 806).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals and remanding these cases for further consideration of the tax liability upon the basis that the transaction

between the Minnesota Tea Company and the Grand Union Company was a reorganization within the meaning of the statute.

ARGUMENT

Respondents are stockholders of the Minnesota Tea Company and the tax liabilities asserted in these cases depend entirely upon the decision of this Court in *Guy T. Helvering, Commissioner of Internal Revenue*, v. *Minnesota Tea Company*, No. 174, present term.

There is no separate question to be decided in these cases and the argument in support of the Government's contentions is fully presented in No. 174. Accordingly, we here refer to the brief filed in that case and ask that the argument therein be incorporated herein by reference.

CONCLUSION

For the reasons set forth in the brief for petitioner in No. 174, we respectfully submit that the decisions of the Circuit Court of Appeals in these cases should be reversed.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
SEWALL KEY,
J. LOUIS MONARCH,
Special Assistants to the Attorney General.

NOVEMBER 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. 175-6.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
E. C. PETERSON.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
L. T. PETERSON.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. 175-6.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

E. C. PETERSON.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

L. T. PETERSON.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 44) is reported in 28 B. T. A. 591. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 806.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered March 25, 1935. The jurisdiction of this Court is invoked by the petitioner under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether a transfer by one corporation (the Minnesota Tea Company) of substantially all its properties to another corporation (the Grand Union Company) in exchange for 18,000 shares of the common stock of the latter (worth $540,000 (R. 46)), plus $426,842.52 in cash, followed by the distribution of the cash to the stockholders of the transferor corporation, the transferor corporation remaining in existence and holding as its assets the 18,000 shares of stock of the transferee, constitutes a "reorganization" within the meaning of Sec. 112(i)(1)(A) of the Revenue Act of 1928.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix (pp. 13-16) to the Government's petition for certiorari in *Helvering* v. *Minnesota Tea Company*, No. 174, October Term, 1935, and are not repeated here.

STATEMENT.

The facts appear to have been correctly stated on pages 2-4 of the Government's petition.

These cases involve the question presented in the case of *Helvering* v. *Minnesota Tea Company*, No. 174. The attention of the Court is respectfully directed to the Brief in Opposition in that case, filed simultaneously herewith. For

the reasons there stated, the respondents oppose the granting of the Government's petition in these cases.

Respectfully submitted,

OSCAR MITCHELL,
JAMES G. NYE,
HOMER HENDRICKS,
C. J. McGUIRE,
Counsel for Respondents.

August, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 175-6

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner

v.

E. C. PETERSON

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner

v.

L. T. PETERSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 175-6

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner

v.

E. C. PETERSON

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner

v.

L. T. PETERSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 35) is reported in 28 B. T. A. 591. The opinion of the Circuit Court of Appeals (R. 52) is reported in 76 F. (2d) 806.

JURISDICTION.

The judgments of the Circuit Court of Appeals were entered March 25, 1935. (R. 54, 55.) The petition for writs of certiorari was filed June 25, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked by the petitioner under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the following transaction constitutes a "reorganization", within the meaning of Sec. 112(i)(1)(A), Revenue Act of 1928: The Minnesota Tea Company transferred all its properties to another corporation (Grand Union Company) in exchange for common stock (voting-trust certificates) of the latter, which the Tea Company continued to hold, plus a sum in cash which the Tea Company immediately distributed to its stockholders, who assumed certain liabilities of the Tea Company. (The petitioners were among such stockholders.)

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix to the brief for the respondent in *Helvering* v. *Minnesota Tea Company*, No. 174, present term, and are not repeated here.

STATEMENT.

The facts appear to have been correctly stated on pages 2-4 of the petitioner's brief, with the following exceptions:

(1) It was stipulated that—"On August 23, 1928, the said Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of the common capital stock (represented by voting-trust certificates) of

said Grand Union Company, plus the sum of $426,842.52 in cash." (R. 18.)

(2) Before the Board the instant cases were consolidated for hearing, but they were not consolidated for hearing with the case of *Minnesota Tea Company* v. *Commissioner*, 28 B. T. A. 591. (R. 3, 4.)

ARGUMENT.

In support of their position that the transfer by the Minnesota Tea Company of all its properties to the Grand Union Company was a "reorganization", within the meaning of Sec. 112(i)(1)(A), Revenue Act of 1928, the respondents in the instant cases respectfully refer the Court to the arguments in the brief for the respondent in *Helvering* v. *Minnesota Tea Company*, No. 174, present term.

CONCLUSION.

For the reasons stated in said brief for respondent in No. 174, the respondents here respectfully submit that the decisions of the Circuit Court of Appeals should be affirmed.

OSCAR MITCHELL,
JAMES G. NYE,
HOMER HENDRICKS,
C. J. McGUIRE,
Counsel for Respondents.

November, 1935.

pp. 3 + 4.

SUPREME COURT OF THE UNITED STATES.

Nos. 174, 175, 176.—October Term, 1935.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 174 *vs.* Minnesota Tea Company. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 175 *vs.* E. C. Peterson. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 176 *vs.* L. T. Peterson.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 16, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

No. 174.

Respondent, a Minnesota corporation with three stockholders, assailed a deficiency assessment for 1928 income tax and prevailed below. The Commissioner seeks reversal. He claims the transaction out of which the assessment arose was not a reorganization within Sec. 112, par. (i) (1) (A), Revenue Act, 1928, c. 852, 45 Stat. 791. "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation." The Circuit Court of Appeals held otherwise and remanded the cause for determination by the Board whether the whole of the cash received by the Minnesota Tea Company was in fact distributed as required by the act. We granted certiorari because of alleged conflicting opinions.

The petition also stated that, as the taxpayer made an earlier conveyance of certain assets, the later one, here in question, of what remained to the Grand Union Company did not result in acquisition by one corporation of substantially all property of

another. This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it.

Statutory provisions presently helpful are in the margin.*

July 14, 1928, respondent caused Peterson Investment Company to be organized and transferred to the latter real estate, invest-

Revenue Act, 1918, c. 18, 40 Stat. 1060.

Sec. 202. (b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged.

Revenue Act, 1921, c. 136, 42 Stat. 230.

Sec. 202. (c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized—

(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word "reorganization," as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation.

Revenue Act, 1924, c. 234, 43 Stat. 256.

Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

(b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(c) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in ex-

ments and miscellaneous assets in exchange for the transferee's entire capital stock. The shares thus obtained were immediately distributed among the three stockholders. August 23, 1928 it transferred all remaining assets to Grand Union Company in exchange for voting trust certificates, representing 18000 shares of the transferee's common stock, and $426,842.52 cash. It retained the certificates; but immediately distributed the money among the stockholders, who agreed to pay $106,471.73 of its outstanding debts. Although of opinion that there had been reorganization, the Commissioner treated as taxable gain the amount of the assumed debts upon the view that this amount of the cash received by the company was really appropriated to the payment of its debts.

---

change consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

Revenue Act, 1926, c. 27, 44 Stat. 12.

Sec. 203 (a), (b) (2), (b) (3), (b) (4), (c), (c) (1), (c) (2), (h), (h) (1) and (h) (2) repeat the words of Sec. 203 (a), (b) (2), (b) (3), (b) (4), (c), (c) (1), (c) (2), (h), (h) (1) and (h) (2) of the Act of 1924.

Revenue Act, 1928, c. 852, 45 Stat. 816.

Sec. 112(a), (b) (3), (b) (4), (b) (5), (d), (d) (1), (d) (2), (i), (i) (1) and (i) (2) repeat the words of Sec. 203 (a), (b) (2), (b) (3), (b) (4), (c), (c) (1), (c) (2), (h), (h) (1) and (h) (2) of the Act of 1924.

Revenue Act, 1932, c. 209, 47 Stat. 196.

Sec. 112 (a), (b) (3), (b) (4), (b) (5), (d), (d) (1), (d) (2), (i), (i) (1) and (i) (2) repeat the words of Sec. 203 (a), (b) (2), (b) (3), (b) (4), (c), (c) (1), (c) (2), (h), (h) (1) and (h) (2) of the Act of 1924.

The matter went before the Board of Tax Appeals upon the question whether the Commissioner ruled rightly in respect of this taxable gain. Both parties proceeded upon the view that there had been reorganization. Of its own motion, the Board questioned and denied the existence of one. It then ruled that the corporation had realized taxable gain amounting to the difference between cost of the property transferred and the cash received plus the value of the 18000 shares—$712,195.90.

The Circuit Court of Appeals found there was reorganization within the statute and reversed the Board. It concluded that the words "the acquisition by one corporation of . . . substantially all the property of another corporation" plainly include the transaction under consideration. Also that Clause (B), Sec. 112 (i) (1), first introduced by Revenue Act of 1924, and continued in later statutes, did not narrow the scope of Clause (A). Further, that reorganization was not dependent upon dissolution by the conveying corporation. And finally, that its conclusions find support in Treasury regulations long in force.

These conclusions we think are correct.

The Commisioner maintains that the statute presents two definitions of reorganization by transfer of assets. One, Clause (B), requires that the transferror obtain control of the transferee. The other, Clause (A), is part of the definition of merger or consolidation, and must be narrowly interpreted so as to necessitate something nearly akin to technical merger or consolidation. These clauses have separate legislative histories and were intended to be mutually exclusive. Consequently, he says, Clause (A) must be restricted to prevent overlapping and negation of the condition in Clause (B). Also, the transaction here involved substantially changed the relation of the taxpayer to its assets; a large amount of cash passed between the parties; there are many attributes of a sale; what was done did not sufficiently resemble merger or consolidation as commonly understood.

With painstaking care, the opinion of the court below gives the history of Clauses (A) and (B), Sec. 112 (i) (1). We need not repeat the story. Clause (A) first appeared in the Act of 1921; (B) was added by the 1924 Act. We find nothing in the history or words employed which indicates an intention to modify the evident meaning of (A) by what appears in (B). Both can have

effect, and if one does somewhat overlap the other the taxpayer should not be denied, for that reason, what one paragraph clearly grants him. Treasury regulations long enforced support the taxpayer's position, as the opinion below plainly points out.

Pinellas Ice Co. v. *Commissioner*, 287 U. S. 462, 470, considered the language of Sec. 203 (h) (1) (A), Act of 1926, which became Sec. 112 (i) (1) (A), Act of 1928, and held that a sale for money or short-term notes was not within its intendment. We approved the conclusion of the Commissioner, Board of Tax Appeals and Court of Appeals that the transaction there involved was in reality a sale for the equivalent of money—not an exchange for securities. But we disapproved the following assumption and observations of the court: "That in adopting paragraph (h) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point." And we said: "The words within the parenthesis may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one Company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." And we now add that this interest must be definite and material; it must represent a substantial part of the value of the thing transferred. This much is necessary in order that the result accomplished may genuinely partake of the nature of merger or consolidation.

Gregory v. *Helvering*, 293 U. S. 465, revealed a sham—a mere device intended to obscure the character of the transaction. We,

of course, disregarded the mask and dealt with realities. The present record discloses no such situation; nothing suggests other than a bona fide business move.

The transaction here was no sale, but partook of the nature of a reorganization in that the seller acquired a definite and substantial interest in the purchaser.

True it is that the relationship of the taxpayer to the assets conveyed was substantially changed, but this is not inhibited by the statute. Also, a large part of the consideration was cash. This, we think, is permissible so long as the taxpayer received an interest in the affairs of the transferee which represented a material part of the value of the transferred assets.

Finally, it is said the transferror was not dissolved and therefore the transaction does not adequately resemble consolidation. But dissolution is not prescribed and we are unable to see that such action is essential to the end in view.

The challenged judgment is

Affirmed.

Nos. 175 and 176.

The respondents in these cases are two of the three stockholders of Minnesota Tea Company. The writs were granted upon the Commissioner's petition which states the question involved is whether the transaction between Minnesota Tea Company and Grand Union Company, described above—No. 174—resulted in a reorganization within the Revenue Act of 1928. The petition also declared—"The amount of the tax due from the respondents, . . . depends solely upon whether the transfer of the properties of the Minnesota Tea Company to the Grand Union Company was a reorganization within the meaning of the Revenue Act."

We think the court below rightly decided there was a reorganization. It reversed the Board of Tax Appeals and remanded the cause for further proceedings, and its judgment must be

Affirmed.